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**United States
Department of Labor
Annual Report for
Fiscal Year 1989**



COMPLETED

United States Department of Labor Annual Report for Fiscal Year 1989



Elizabeth Dole, Secretary

United States Department of Labor

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Executive Summary

That working people and their families are among the chief beneficiaries of stable economic growth was demonstrated once again in fiscal year 1989. Employment increased by 2.9 million, bringing the total new job growth since late 1982 to more than 20 million. The 119.2 Americans who held jobs during the final quarter constituted 63.3 percent of the nation's working-age population, with both of these figures being all-time records. The average overall unemployment rate of 5.2 percent was the lowest in 15 years.

Employment was up for blacks, Hispanics and women, with women continuing to make the biggest gains. Three-fifths of the increased employment in fiscal year 1989 occurred among women, and women have accounted for over half of the employment gains since 1982.

Strong increases in jobs for blacks and Hispanics in 1989 continued a trend which has produced an employment increase of 36 percent for blacks and 48 percent for Hispanics since the low point in economic activity at the end of 1982.

Real disposable income also rose in 1989, increasing 4 percent as inflation remained under control.

Recognizing that a skilled labor force is the key to economic growth and prosperity, the Labor Department pressed ahead with its campaign to emphasize and improve education and training for American workers. After a year-long study that included a series of public hearings across the nation, the Secretary of Labor's Commission on Workforce Quality and Labor Market Efficiency called for a wide range of actions by government, business and labor to combat an emerging workforce crisis.

The 21-member commission, composed of representatives of business, labor, government, the education community and the public, called for fundamental changes in worker education and training to deal with a growing imbalance between workforce skills and the increasingly demanding jobs the nation's economy is creating.

Secretary of Labor Elizabeth Dole said that the skills gap cited by the commission "must be bridged if our remarkable economic expansion is to continue, and if we are to succeed in the ever more competitive global marketplace." She pointed out that legislation proposed by the Administration would accomplish a key commission recommendation by improving the Job Training Partnership Act (JTPA), including targeting more resources on those most in need of remedial education.

Secretary Dole also emphasized the importance of commission recommendations to improve training for adults already in the workforce, ease conflicts between work and family responsibilities, increase the portability of pension benefits, and make the Labor Department a clearinghouse for information on employee training.

The commission's findings and recommendations augmented a number of reports on key workforce matters issued earlier in the year by the Labor Department. These included a report on labor shortages and a report urging reconsideration of traditional recruiting, training, and benefit packages for older workers to encourage later retirement.

Job Safety and Health

Both the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) took significant steps in the setting of standards aimed at reducing safety and health hazards in the workplace. Final standards on air contaminants, hazardous waste operations and emergency response were among 18 major actions on health or safety standards taken by OSHA during the year. OSHA standard-setting activity also included publication of a proposed rule to protect more than five million health care workers against the hazards of AIDS, hepatitis and other blood-borne diseases.

MSHA issued a proposal to revise air quality standards for mines, an action that could have a major beneficial impact on the health of mine workers.

Among the more than 50,400 workplace inspections conducted by OSHA was a thorough review of conditions at

John Morrell and Company in Sioux Falls, SD, that resulted in \$4.3 million in proposed penalties for serious worker safety and health hazards. Penalties of \$2.7 million were proposed against Friction Division Products of Trenton, NJ, for willful violations relating to asbestos exposure, and OSHA took action in federal court to compel the company to immediately cease exposing employees to serious asbestos hazards.

MSHA's activities to protect miners included establishment of a special agency task force to identify illegal or "wildcat" coal mines that have not registered with the government so they can be inspected. Convictions were obtained against a number of violators and MSHA plans to continue this effort.

Responding to a growing problem in the meatpacking industry, OSHA began planning for a special emphasis program that will focus on carpal tunnel syndrome and other disorders associated with jobs that require workers to perform repetitive motions.

OSHA and MSHA continued to emphasize the importance of employer cooperation in making the workplace safer. OSHA's cooperative program includes on-site consultation visits, recognition of exemplary worksites, safety and health grants and training courses. MSHA inspectors visited many mines at the operators' request to help them comply with safety and health regulations and provided grants to states for use in their safety and health training programs. MSHA-produced videotapes with safety messages were played more than 150,000 times in workers' changing rooms at underground coal mines.

Employment Standards

Some \$122 million in back minimum wages and overtime pay was obtained for 411,000 workers as a result of enforcement actions taken by the Employment Standards Administration (ESA). The agency conducted more than 74,000 compliance actions under the Fair Labor Standards Act. Employers agreed to pay more than \$35 million to almost 52,000 workers

following investigations under the Davis-Bacon Act and other wage laws covering government contractors.

A landmark 11-year sex and race discrimination case initiated by the Office of Federal Contract Compliance Programs (OFCCP) came to a successful conclusion when Harris Savings and Trust Bank of Chicago agreed to a record \$14 million settlement. The \$14 million, to be distributed to women and minority group members who were employed at the bank between May 1973 and December 1988, is the largest back-pay amount ever obtained by the Federal Government in a sex or race discrimination case. In addition to the back pay, the bank agreed to change its affirmative action plan and to provide training to enable women and minorities to overcome problems which might limit their advancement in the firm's workforce.

The OFCCP's ongoing efforts to assure equal employment opportunity in government contracts produced 603 agreements during the fiscal year under which contractors committed to almost \$37 million in outlays for pay adjustments, training, recruitment or similar purposes. More than \$21 million of this was for back pay awards to some 6,600 women, minorities, persons with handicaps and veterans.

OFCCP completed 6,232 compliance reviews, entered into 2,568 conciliation agreements and 1,988 letters of commitment, and recommended 115 enforcement actions that could result in firms losing their eligibility for Federal contracts. There were 599 cases pending at the end of the year, down sharply from the 3,208 carried over from fiscal 1988.

OFCCP again emphasized voluntary compliance by providing almost 57,000 hours of technical assistance to contractors to help them comply with affirmative action requirements. In addition, 15 new liaison groups were formed during the year to explore compliance problems and solutions with employers in a cooperative setting.

Over \$2 billion in medical and rehabilitation services and wage loss benefits was paid by the Office of Workers' Compensation Programs to about 400,000 injured workers under the Federal Employees Compensation Act, Black Lung Benefits Act and Longshore and Harbor Workers' Compensation Act. A

variety of new initiatives, including visits by nurses to injured workers, enabled a record 1,718 injured Federal employees and longshore and harbor workers to return to work through rehabilitation.

Final regulations were issued during the year to revise restrictions on working at home that had existed for almost half a century. Restrictions on homework were lifted, subject to a certification process, in six industries: jewelry manufacturing, gloves and mittens, button and buckle manufacturing, handkerchiefs, embroideries, and knitted outerwear. Homework bans were retained only in the women's apparel industry (pending further study) and in jewelry manufacturing operations that entail safety and health hazards. Applications to use homeworkers under the new regulations were received from 60 employers.

Final regulations also were issued under the 1988 law that sharply restricts the use of lie detector tests by employers. ESA conducted 51 investigations involving the use of prohibited lie detector tests and obtained compliance agreement in almost all the cases.

Employment and Training

A major effort was launched to enable the Job Training Partnership Act (JTPA) to play a more effective role in preparing minorities and the disadvantaged for the more demanding but rewarding jobs of the future. Drawing on research and analysis by Employment and Training Administration (ETA) staff and the work of an advisory committee appointed by the Secretary of Labor, the Administration proposed amending the JTPA to target more of its resources on workers most in need of help to succeed in a changing job market.

Secretary Dole said that although JTPA's 68 percent job placement record was "unprecedented," the program could be made even better. The proposed changes would improve the targeting of JTPA to those most in need or at risk, enhance the quality of JTPA services, and promote coordination of human resource programs serving the disadvantaged. The amendments

also would create a program of grants to fund comprehensive services to youth living in high poverty areas and establish a year-round youth program of education, training and work experience.

The Veterans' Employment and Training Service took steps to assure that employment help for veterans goes to those most in need by redirecting the spending of veterans funds under JTPA. The restructuring calls for minorities, Vietnam theater, and special disabled veterans to comprise 75 percent of those served under JTPA's program for veterans. A study found that these three groups have the highest unemployment rates among veterans and the longest periods of unemployment between jobs.

Finishing touches were put on an important legislative initiative when ETA issued final regulations under the so-called plant closing law. Enacted in 1988, this law establishes a comprehensive program of services to help dislocated workers return to productive employment as quickly as possible.

In keeping with its emphasis on helping workers become or remain productive, ETA supported a series of demonstration projects designed to identify quickly and assist those workers drawing unemployment benefits who are most likely to have difficulty finding another job.

Pension and Welfare Benefits

Enforcement actions by the Pension and Welfare Benefit Administration (PWBA) were responsible for recovering more than \$111 million for employee benefit plans nationwide, with \$88 million of the total coming through voluntary compliance and almost \$23 million as a result of litigation.

The agency's strategy of concentrating enforcement activity against organizations and institutions that provide services to many different benefit plans continued to pay dividends. The more than 500 cases initiated against banks, major brokerage firms, insurance companies and providers of dental plans resulted in \$49 million in restored assets and prohibited transaction reversals for pension and welfare plans.

More than \$8 million--the highest amount ever--was obtained for plan participants who sought PWBA's help in securing payments to which they were entitled but couldn't get on their own.

The handling of stock by investment managers continued to receive attention. Investment managers were advised that the voting of proxies on stock shares held by plans would be monitored to assure conformance with ERISA requirements. A joint policy statement by PWBA and the Treasury Department dealt with investment decisions by plans involved in corporate tender offers, takeovers and mergers. Investment managers are not automatically required to tender shares, the statement pointed out, but must make their decision based on the facts and circumstances of the individual case.

Looking to the future, PWBA began to develop regulations for carrying out the responsibilities it will assume under the Federal Employees Retirement System Act.

Other Activities and Initiatives

Secretary Dole, accompanied by her husband, Senator Robert Dole, visited Poland as President Bush's representative at the first meeting between top-level American officials and the prime minister of Poland's new non-communist government. The Secretary directed the Department's International Labor Affairs Bureau to develop and oversee the Department's plans to provide technical assistance to Poland and Hungary.

Almost \$2 million in embezzled union funds were recovered and more than \$265,000 in fines were imposed by the courts as a result of enforcement actions taken by the Office of Labor-Management Standards (OLMS) under the Labor-Management Reporting and Disclosure Act. OLMS investigations led to 168 indictments and other criminal actions during the year and 149 convictions and pre-trial agreements.

The Bureau of Labor-Management Relations and Cooperative Programs responded to continuing change in labor relations policies and practices, both at home and abroad, by offering new services and materials. New technical assistance programs were developed and a variety of research reports and

case studies issued to help practitioners create and maintain joint labor-management efforts in the workplace.

Child care arrangements for working mothers remained a priority concern of the Women's Bureau. A major bureau project, the Clearinghouse on Implementation of Child Care and Eldercare Services, provides information on employer-sponsored child care options. Other issues receiving considerable attention included eldercare, flexible benefits, nontraditional jobs, training opportunities, and youth at risk.

Successful prosecutions following investigations carried out by the Office of the Inspector General resulted in more than \$16.5 million in recoveries, restitutions, fines, settlements, cost efficiencies and administrative penalties.

Among the major accomplishments of the Bureau of Labor Statistics were completion of a survey of employers' anti-drug programs, preparation of special reports to Congress on the labor market status of older workers and Vietnam-era veterans, and acceleration of the monthly release schedule for the Consumer Price Index.

The concerted effort launched in 1988 to improve the Department's own productivity and make it a better place to work continued unabated in 1989. Employees were offered information and assistance on obtaining care for children and elderly dependents. Membership in the National Office Fitness Center increased to more than 1,000, and four regional fitness center proposals were approved.

Emphasis on recruitment and upgrading of groups which are underrepresented in the department's workforce resulted in increases in Hispanic employment and more women and minorities in the higher grades. Completing its first full year as the department's primary training resource, the DOL Academy significantly increased the quality training opportunities available to all employees. Academy highlights included the introduction of required training for clerical employees and new training requirements for supervisors.

Employment and Training Administration

Major ETA initiatives during the periods covered in this report concern: a new legislative proposal that would amend the Job Training Partnership Act (JTPA), enabling the nationwide JTPA training system to better target services to those who most need education and training; a comprehensive review of the concept of apprenticeship training; and the operation of a series of demonstration projects to test the feasibility of identifying potential unemployment insurance (UI) exhaustees early in their benefit period and providing them several different forms of assistance in order to facilitate their early return to work.

These activities, and other developments, are reported below by individual program or agency function. For those activities that operate on a program year cycle, the discussion covers program year (PY) 1988 (July 1988 to June 1989). For those that operate on a fiscal year basis, the information is provided for fiscal year 1989 (October 1988 to September 1989).

Job Training Partnership Act Programs

The Job Training Partnership Act authorizes the largest system of Federal job training programs. The bulk of JTPA funds are allocated to States and to more than 600 local service delivery areas (SDAs) that administer programs for economically disadvantaged youth and adults and dislocated workers. The legislation also authorizes various forms of assistance to other target groups, provides for a program of research, demonstration, and evaluation, and mandates a system of standards to measure the performance of individual program operators.

In PY 1988, the Administration proposed legislation to amend the Job Training Partnership Act. The proposals incorporate the recommendations of an advisory committee appointed by the Secretary. (See policy and planning section.)

Adult and Youth Programs

Under Title II-A, JTPA provides block grants to each State to fund training and other employment-related services for adults and youth. Twenty-two percent of a State's II-A funds are reserved for statewide activities, and the remainder is allocated to SDAs within the State. Expenditures for these programs totaled more than \$1.8 billion in PY 1988, and over 1.2 million youth and adults were served.

Of participants leaving Title II-A programs operated by SDAs, 45 percent were youth, 53 percent were female, 50 percent were minorities, 26 percent had been receiving welfare, and 27 percent were high school dropouts.

Sixty percent of program terminees entered employment, with an average starting wage of \$5.07. Youth terminees had a positive termination rate of 80 percent. Over 90 percent of SDA enrollees were economically disadvantaged.

Summer Youth Program

The Summer Youth Employment and Training Program (JTPA Title II-B) provides job opportunities as well as training and educational services for economically disadvantaged youth, ages 14 to 21. The 1989 summer program served over 600,000 participants, with expenditures totaling \$696.9 million. Fifty percent of the participants were female, 69 percent minorities, and 4 percent school dropouts.

Dislocated Worker Programs

Title III of JTPA authorizes dislocated worker programs which in PY 1988 served more than 207,000 persons, workers who had been laid off or terminated from their jobs. Expenditures totaled more than \$252 million. Forty-three percent of those leaving the program had previously been unemployed for at least 15 of the prior 26 weeks. Sixty-nine percent of program terminees entered employment, at an average hourly wage of \$7.54.

Funds for Title III programs were allocated by formula to the States, with 25 percent retained in the Secretary's National Reserve Account. This account financed special projects

proposed by Governors, usually programs targeted to specific groups of dislocated workers.

PY 1988 was a year of transition from the old Title III of JTPA to the new Title III, the Economic Dislocation and Worker Adjustment Assistance (EDWAA) Program, which was authorized by the Omnibus Trade and Competitiveness Act of 1988 and became effective July 1, 1989. During PY 1988, national and regional planning conferences related to EDWAA were held and some of the new program's provisions were implemented.

EDWAA provides readjustment and retraining services and needs-related payments for dislocated workers. Eighty percent of EDWAA funds are distributed by formula to the States and 20 percent are reserved for the Secretary for demonstration programs and multi-State or industry-wide projects. Half of a State's funds are to be allocated by formula to sub-State areas for provision of training and other services.

Up to 40 percent of a State's allocation can be used by the Governor for State responsibilities, which include a rapid response unit that deals with substantial layoffs and plant closures within the State. Ten percent of a State's allocation can be retained by the Governor for distribution during the program year to sub-State areas according to need.

Job Corps

During PY 1988, the Job Corps--authorized by JTPA Title IV--served approximately 68,000 new enrollees. Average enrollment at any time during the period was 38,700. The program provides training, education, and support services, primarily in residential centers, for disadvantaged youth aged 16 through 21. Of the 107 centers, 66 had some nonresidential enrollees, with a national nonresidential enrollment of 10 percent. Costs for the program in PY 1988 totaled \$712.2 million.

"Job Corps II," a series of pilot and demonstration projects designed to increase the program's effectiveness, continued to be the program's major initiative in PY 1988. The effort included such activities as the establishment of two

nonresidential centers and the operation of evening classes, thus enabling some enrollees to hold part-time jobs while in training.

Job Corps II also focuses on the development of stronger ties between Job Corps centers and local JTPA programs, arrangements for dependent children, and the enhancement of services to foster care youth. Assessment of all major Job Corps II projects was undertaken during PY 1988, with final evaluations scheduled for completion during program year 1989.

Competency-based curricula were developed and implemented for 15 occupational clusters to complement the 10 implemented the previous year. These 25 occupational clusters account for approximately 80 percent of the Job Corps vocational enrollment. A new Occupational Exploration Program (OEP) and a revised World of Work (WOW) curricula were written, tested, and issued during the program year. The OEP and WOW curricula are competency-based and contain considerable amounts of visual materials to promote student comprehension and interest.

ETA began development of a Social Skills Training program for Job Corps, an effort to expand student learning beyond academic and vocational education. When completed, it will consist of a structured curriculum aimed at developing student competency in social and interpersonal skills. Nationwide implementation of the program is expected in the spring of 1991.

In PY 1988, ETA also initiated a three-year project to totally reconstruct and revise the Job Corps education curriculum. This completely modernized curriculum will include competency-based objectives; new printed, audio-visual, and computer-assisted instructional materials; and a computer-driven classroom management system.

Native American Programs

JTPA Title IV programs for Native Americans are funded through grants to Indian tribes, other Native American communities, and various related organizations. Approximately

34,000 participants received a wide variety of job-related service in PY 1988 under these programs, at a cost of \$61 million. Thirty percent of the participants were enrolled in classroom training, 10 percent in on-the-job training, 21 percent in work experience, and 6 percent in community service employment. Another 33 percent received various supportive services.

Grantees' performance continued to improve in PY 1988. ETA officials made approximately 85 on-site visits to grantees to monitor performance. They also participated in five regional and one national grantee-sponsored meetings and provided technical assistance and information. A training and technical assistance contractor conducted an additional four training seminars for grantees and made approximately 50 on-site technical assistance visits.

Migrant and Seasonal Farmworker Programs

Title IV of JTPA also authorizes migrant and seasonal farmworker programs which, at a total cost of \$63 million, served nearly 55,000 persons in PY 1988. Some 10,800 participants received classroom training, 8,600 were enrolled in on-the-job training, and 1,900 were placed in work experience positions.

ETA continued its emphasis on farmworker youth employability enhancement, and about 9,500 participants aged 14 to 21 took part in these activities. As in previous years, grantees were instructed to refer eligible youth to Job Corps centers. About 95 percent of the programs had formal agreements with vocational centers or other private training institutions.

The Federal Emergency Management Agency (FEMA) transferred \$5 million to farmworker grantees to provide emergency assistance in drought-stricken States. Nearly 19,000 drought-affected farmworkers were served, at an average assistance level of \$262 a person.

Projects for Persons with Disabilities

More than 7,000 persons with physical or mental disabilities were provided training and job placement services under JTPA

Title IV in PY 1988. Participants suffered from blindness, deafness, epilepsy, mental retardation, and other physical and severe emotional problems. The seven national organizations that administer these programs for ETA were granted a total of \$3.6 million during the period.

Pilot and Demonstration Programs

During the 1988 program year, 30 new projects were funded as part of a comprehensive effort to seek more effective approaches and strategies for addressing the needs of such increasingly difficult-to-serve groups as at-risk youth, youth offenders, displaced homemakers, and workers lacking basic workplace skills.

The bulk of the projects (23) were selected for funding via a competitive solicitation designed to improve State and local coordination in developing and implementing comprehensive programs to meet the multi-faceted needs of the target groups.

Overall objectives were: to detail the major problems involved in developing operational linkages among agencies; to provide viable solutions to overcoming barriers to interagency coordination involving JTPA programs; and to identify effective planning and implementation approaches for demonstrating potentially successful coordination and program models.

The other seven new projects were one-year initiatives undertaken by seven of the ongoing national partnership grantees under a limited "partnership enhancement" solicitation. For the most part, these involved efforts to improve the quality of services provided, expand services to additional target groups, and increase coordination and linkages with other support services/agencies.

Performance Standards

JTPA requires the Secretary to establish a system of standards for the various titles that measure program performance.

For the PY 1988-89 two-year planning cycle, the number of performance standards for Title II-A was increased from seven to 12, with the understanding that Governors need select

only eight. Guidelines require at least one of the eight to be a "quality of placement" standard (either the average wage at placement or weekly earnings at follow-up, or both) and another to be a noncost youth standard (either the positive termination rate, the employability enhancement rate, or the youth entered employment rate).

One of the five new Title II-A standards addresses the acquisition of youth employment competencies in specific skill areas (preemployment/work maturity, basic education, and/or job specific skills); the other four are designed to determine the employment and earnings status of adult and adult welfare participants 13 weeks after termination.

Governors were required to set an entered employment rate standard for Title III in PY 1988 and were encouraged to set an average wage at placement goal.

PY 1988 marked the second full program year in which the new model-based process was utilized to establish individually adjusted performance standards for the nationally supervised Title IV programs for Indians and other Native Americans and for migrant and seasonal farmworkers.

Indian and Native American (INA) grantees are required to meet three performance measures: entered employment rate, positive termination rate, and cost per positive termination. They also have an optional community benefit project measure. Migrant and seasonal farmworker (MSFW) grantees are required to meet two performance measures: entered employment rate and cost per entered employment.

ETA completed the following performance standards activities for both INA and MSFW grantees in PY 1988: assessing PY 1987 final results, monitoring PY 1988 grantee performance, and developing the performance standards planning levels for PY 1989.

ETA continued its development and implementation of performance standards for Job Corps centers by adopting an average length of stay retention standard. (This replaced the 90-day and 180-day retention standards.) Education (GED attainment and learning gains in math and reading) and placement standards continued in place for PY 1988.

Older Worker Program

More than 100,000 low-income elderly persons were provided part-time jobs under the Senior Community Service Employment Program (SCSEP) in PY 1988. The program's appropriation was \$331 million for the period, during which time over 24 percent of the participants moved from subsidized to nonsubsidized positions. Many of these workers were placed in jobs in the private sector while others became part of the regular staff at the community agencies where they worked while enrolled in SCSEP.

To accommodate the increasing number of older workers in the general population and make the program available to more eligible persons, ETA encouraged SCSEP operators to coordinate their community service jobs with training and job referral opportunities available through such programs as JTPA.

Apprenticeship

Approximately 350,000 apprentices received training in 45,000 registered programs in fiscal year 1989. During the period, ETA received about 28,000 public inquiries regarding apprenticeship, and BAT staff conducted about 24,000 promotional (or technical) on-site visits, 1,800 compliance reviews, and 2,150 program reviews to ensure quality training. ETA recognizes 812 occupations as apprenticeable.

The comprehensive review of the apprenticeship concept of training--Apprenticeship 2000--which was launched in December 1987, neared completion in FY 1989. Findings from short-term research projects, analysis of relevant studies, and a broad public dialogue were used to formulate policy recommendations. Review findings and recommendations were summarized in a policy paper released in November 1989. The paper addresses expansion of a structured, work-based training concept applying the apprenticeship concept to a broader setting, while preserving the traditional model in existing industries and occupations. The features expected to form the core of other formal structured, experiential programs include

on-the-job training combined with theoretical instruction, accreditation/recognition by an independent agency, and technical assistance provided by the Federal Government.

Other important components of the Apprenticeship 2000 review during the year included: an international symposium in conjunction with the Organization for Economic Cooperation and Development, the publication of a series of short-term research papers related to various areas of the apprenticeship concept, publication of an analysis and summary of responses to two focus papers on expansion themes and the award of three grants and two contracts to develop and demonstrate a number of approaches for expanding structured, work-based training.

Employment Service

ETA continued in PY 1988 to review means by which the public employment service (ES) could better serve both employers and job applicants in the 1990s and beyond, in recognition of the changing demographics of the work force, the low skill level of many new labor force entrants, and the assessment and retraining needs of workers displaced by a rapidly changing economy.

To this end, over \$1.5 million in demonstration grants were awarded to eight States to test innovative ES practices. The focus of the 18-month projects was on improving services through such approaches as "one-stop-shop" programs, increasing private sector involvement in local ES activities, and enhancing the State role in developing ES policy.

Three ES information exchange forums were held so that national, State, and local policymakers and planners could share information on successful and innovative approaches developed by State employment security agencies (SESAs). From 142 models submitted by SESAs, 60 were selected for presentation at forum workshops. Following the forums, a monograph containing highlights of the meetings was distributed to all States and a videotape was developed for State use.

In the meantime, the ES continued serving the immediate needs of employers and jobseekers. In PY 1988, the ES registered 18.5 million applicants and provided some reportable

service to 6.6 million of them. Over 3.8 million applicants were placed in a job or obtained one after receiving services. Labor exchange expenditures for the period totaled \$727.8 million.

In FY 1989, ETA and the Labor Department's Office of the Assistant Secretary for Veteran's Employment and Training renewed their consolidated agreement with the Employers' National Job Service Committee (ENJSC). The agreement includes special emphasis on involving employers in planning employment and training programs at State and community levels and recruiting workers through the public ES.

Placement of special applicant group members, such as veterans, is enhanced through ENJSC cooperation. Job Service Employer Committees--State and local units of the ENJSC--operate in more than 1,300 areas, with over 30,000 employers providing volunteers who work with employment security offices to improve services and tailor programs to the needs of their particular labor markets. In the process, the committees work with and supplement activities of JTPA Private Industry Councils.

As required by the JTPA amendments to the Wagner-Peyser Act, the Interstate Job Bank (IJB) compiles listings of hard-to-fill jobs identified by SESAs and distributes them to more than 2,000 local ES offices and to some libraries and colleges. Over 23,000 job openings are available in the IJB on any given day.

In FY 1989, 130,896 new job openings were listed with the IJB. This compares to 89,965 new job openings listed in FY 1988, a 45 percent increase. SESAs improved their automation capabilities, and by the end of the fiscal year nine States were able to telecommunicate directly with the IJB to exchange job order data. (Other States use computer tape exchange to list and obtain job opening information.) During FY 1989, six States installed an on-line applicant self-search system that jobseekers can use to find out-of-State jobs.

The IJB Center also supported a new multi-State Job Bank pilot project in five contiguous States, providing applicant self-search capability via computer terminal into all job listings in the five-State area. The self-search system, called ALEX

(Automated Labor Exchange), is available for installation in any State ES agency. Another self-search system for ES/IJB use, which employs touch-screen technology, was under initial development during FY 1989.

SESAs have responsibilities related to the Targeted Jobs Tax Credit (TJTC) program. SESAs are designated by law to determine individual eligibility for the nine TJTC target groups and to certify employers for the Federal tax credit. Over 497,300 certifications documenting employers' claim for a tax credit for hiring workers from one of the nine traditionally hard-to-place target groups were issued in calendar year 1988.

Increasingly, States are automating or streamlining processing for the TJTC program. In fiscal 1989, ETA sponsored three multi-regional workshops to enable States to exchange techniques, information, and experience with TJTC and to help them to understand the limitations imposed by Congress. Many States were short of TJTC administrative funds during the year, and sought and found ways to economize and other sources of funding that allowed them to continue this special placement incentive.

Under the Immigration and Nationality Act, the Department (through ETA's U.S. Employment Service) has responsibility for certifying that the use of certain categories of foreign workers will not adversely affect job opportunities, wages, and working conditions of U.S. workers. (Such certification is required as a condition to issuance of visas by the Immigration and Naturalization Service.) In FY 1989, 60,849 applications for permanent and temporary labor certification for nonagricultural jobs were approved. In calendar 1988, 23,745 temporary agricultural jobs were certified to be filled by nonimmigrant foreign workers.

Work Incentive Program

Since 1967, the Work Incentive (WIN) program has been the only Federal employment and training program which mandated that welfare clients, as a condition of eligibility for receiving Aid to Families with Dependent Children (AFDC) grants, must

register with the State employment service for training or job placement.

Regular State WIN programs are jointly administered by ETA and the Family Support Administration of the Department of Health and Human Services (HHS). Employment and training services are provided by State employment security agencies; supportive social services, such as child care, are provided by State welfare agencies.

Since 1982, as a Congressional experiment, States have had the choice of conducting a WIN demonstration program (instead of a regular WIN program). Demonstration programs are administered solely by HHS.

In 1988, Congress passed a major new welfare initiative, the Family Support Act, the heart of which is the Job Opportunities and Basic Skills Training (JOBS) program, which began July 1989. JOBS is being administered by HHS, with linkages to other human service programs such as JTPA. States have until October 1, 1990, to implement the JOBS program, at which time the WIN program authority terminates.

At the end of FY 1989, more than 500,000 clients were registered in WIN regular and demonstration programs. During the fiscal year WIN staff placed an estimated 257,585 registrants into unsubsidized jobs, nearly 66 percent of whom earned enough to leave welfare.

Unemployment Compensation

During calendar year 1988, 16.1 million initial claims for unemployment benefits were filed with State employment security agencies. There were 86.8 million weeks compensated for total unemployment and 7.3 million weeks compensated for partial unemployment during the period. Revenues collected by the States for the program totaled \$17.7 billion and benefits paid totaled \$12.6 billion.

Fiscal year 1989 saw improvement in State benefit financing and in repayment of loans from the Federal Unemployment Trust Fund. These loans, provided to States to assure payment of benefits when the individual State trust fund balances became inadequate, had peaked as of March 31, 1984,

when 26 States had outstanding loans totaling \$14 billion. As of August 31, 1989, the balance of such loans had been reduced to \$0.8 billion (interest free), and only one State had an outstanding loan. As of June 30, 1989, all States had a positive balance in their individual trust funds, with an aggregate balance of \$35.6 billion.

ETA continued several unemployment insurance (UI) initiatives during fiscal year 1989 to improve the integrity of the program and to test alternative and innovative ways to accelerate and smooth the transition to reemployment for UI recipients, especially for the long-term unemployed and the displaced worker.

Quality Initiatives

ETA is committed to the development and implementation of a comprehensive, integrated approach to the improvement of the accuracy and timeliness of UI program activities, including the collection of revenues and the payment of benefits. A major component of this effort is the UI Quality Control (QC) program.

Fiscal year 1989 was the second full year of operation of the first portion of the UI/QC program, Benefits Quality Control (BQC). During the year, results from the first year of BQC operations were published by all States. Overall, the average "overpayment" error rate was 10.1 percent of all weeks claimed, while the average "underpayment" error was 0.9 percent. The States found that errors in the application of the "work search" provision of their laws accounted for the vast majority of the reported "overpayment" errors. The results of the UI/QC program are being used by the SESAs to target staff training and program improvement efforts.

Extending Quality Control to the revenue component was actively pursued in FY 1989, and the design of Revenue Quality Control (RQC) was refined through a series of steps: policy issues were articulated and discussed broadly; staff was assembled and trained; and design approach parameters were established by preparing detailed statements of the SESA tax program mission and program objectives and by identifying

assessment approaches to measure the achievement of objectives.

Five State tax experts contributed to the RQC design, and draft design material was reviewed by a steering committee of Federal regional UI tax staff and a panel of State tax experts. A *Federal Register* notice also solicited comment on a series of basic design issues; 23 of the 28 respondents to the notice were SESAs.

In FY 1989, ETA initiated the Performance Measurement Review project, a comprehensive examination of alternative approaches to measuring SESAs' UI performance and the interrelationships between currently existing components of the UI oversight system. The objectives of the project are: to review the Secretary's legal responsibilities for the UI program; to identify and examine alternative methods of evaluating SESA UI performance and to determine what constitutes a minimum level of performance; and to examine linkages between components of the UI oversight program. A January 19, 1989, notice in the *Federal Register* announced the start of the project.

Fiscal Year 1989 was devoted to an extensive research effort. The laws and regulations pertaining to the UI system were studied to identify SESA UI service requirements; the existing data collection and reporting systems were studied to identify gaps and duplications and to assess the validity of the performance data currently available; the history of the existing UI performance review programs was studied to examine the rationale behind the existing programs; performance measurement systems in other Federal agencies were examined to identify innovative approaches that might have applications for the UI system; and factors impacting SESA performance were identified.

ETA also began preparing recommendations for improved methodologies to be used to measure SESA UI performance. This project is being coordinated with the RQC effort.

UI Reemployment Demonstration Projects

For more than 50 years, the UI program has provided temporary income support to eligible unemployed workers.

These payments have provided workers who have been gainfully employed, and who have lost their job through no fault of their own, with partial replacement of lost wages. UI benefit payments, which generally last for up to 26 weeks, are designed to sustain these workers during temporary periods of job loss due to recessions and short-term downturns in the economy.

Emerging trends in the economy and in the demographics of the work force have created new labor market conditions that make the reemployment of structurally unemployed workers a key issue for the UI system. A series of demonstration projects has been initiated to test the feasibility of identifying potential UI exhaustees early in their benefit period and providing them several different forms of reemployment assistance in order to facilitate their early return to work. The assistance, not currently available to UI recipients on a regular basis, is targeted to individuals likely to exhaust their UI entitlement and to have difficulty finding new work.

Demonstration efforts in FY 1989 built upon the benchmark results of the earlier New Jersey UI Reemployment Demonstration Project which was designed to determine whether the UI system could be used to identify displaced workers early in their jobless spells and to test the impact of three alternative early intervention strategies. The final report of that project, released in FY 1989, helped shape the follow-up projects on self-employment incentives and on the effectiveness of reemployment bonuses.

Washington Reemployment Bonus Demonstration Project

The Washington Project began operation in February 1988 and enrolled the last participants in December of that year. It was designed to examine the effect of the offer of a reemployment bonus of various amounts and the effect of different durations of eligibility for the bonus. No additional reemployment services were offered, and only variations of the bonus provisions were tested.

The automated participant tracking system for the project tracked more than 17,500 claimants assigned to the treatment or the control groups. More than 14,100 claimants were assigned

to one of the six treatment groups and were offered a total of \$7,993,500 in bonus payments. The project operated in 21 Job Service centers throughout the State. Longitudinal tracking of the participants continued through the end of FY 1989, with a final report scheduled for FY 1990.

Pennsylvania Reemployment Bonus Demonstration Project

The project studied the effects of the offer of various levels of a reemployment bonus in combination with the offer of a voluntary job search workshop. Claimants filing new initial claims in 12 participating local offices were randomly assigned to a control group or to one of six treatment groups. The treatment groups varied as to the size of the bonus offer and the amount of time allowed for reemployment. Participants were required to retain the job for four months in order to qualify for the bonus payment.

The strategy of testing the linkage of job search assistance and a reemployment bonus was based on the fact that UI recipients, particularly those who are structurally unemployed workers, often lack basic job search skills and delay their search for new employment. The combination of job search assistance and the reemployment bonus is designed to provide both job search skills and the motivation for intensive job search, thus promoting rapid reemployment.

Washington Self-Employment Demonstration Project

The Washington Self-Employment Project encourages participants to set up their own small businesses by making available to these claimants, at the beginning of their period of unemployment, all or part of the UI benefits they would otherwise receive while looking for a job. Jobless workers are now generally ineligible for UI benefits if they attempt to establish their own business and forego searching for paid employment.

The project began pilot implementation in one local Job Service center in September 1989, with full-scale operation scheduled for February 1990. Enrollment of treatment group

members will continue through December 1990.

The project provides counseling, testing, and supportive services related to starting a business, in addition to a self-employment payment based on each participating claimant's UI entitlement. Although several Western European countries have established such programs, the concept of promoting self-employment through the UI system had not previously been tried in the United States.

Three-State Self-Employment Demonstration Project

In accordance with provisions of the Omnibus Budget Reconciliation Act of 1987, the Secretary of Labor entered into agreements with the States of Oregon, Minnesota, and Massachusetts to carry out additional self-employment demonstration projects. These States were competitively selected, based on State applications submitted in response to a notice in the *Federal Register*. ETA developed the three-State project design in FY 1989.

The 1987 law stipulates that the self-employment allowance payments must be made in the same amount, on the same terms, and subject to the same conditions as regular or extended unemployment compensation benefits otherwise payable to the claimant. Therefore, the self-employment allowance payments will be made in the form of periodic payments to eligible individuals on a weekly or biweekly basis. Claimants will also receive business development services including training workshops and seminars that focus on basic business skills, access to one-on-one technical assistance, counseling services, and a case manager.

Trade Adjustment Assistance Program

During FY 1989, a total of 2,282 petitions were filed with the Department of Labor under the Trade Adjustment Assistance (TAA) program, an increase from the 1,019 petitions filed in the previous fiscal year. Workers certified for TAA benefits and reemployment services during the year totaled 89,021, compared to 60,920 workers in the previous fiscal year. The TAA program is authorized by the Trade Act of 1974.

The Omnibus Trade and Competitiveness Act (OTCA) of 1988, which amended the TAA provisions of the Trade Act, gave workers in the oil and gas industry with firms engaged in exploration or drilling a one-time, 90-day opportunity to apply for retroactive trade readjustment allowances (TRA). By the November 18, 1988, deadline, approximately 1,100 petitions had been filed under this special provision.

Under the provisions of the Trade Act, workers who are determined to have been adversely affected by imports are eligible for TRA, training, and job search and relocation assistance. The OTCA amendments made training an entitlement for the first time, and required eligible workers to have completed an approved training program, or to be enrolled in training, as a condition for receiving TRA. (In certain situations, workers may have this requirement waived.)

Preliminary reports for FY 1989 show that \$125.4 million in TRA was paid to 23,677 individuals. Comparable figures in FY 1988 were \$186 million and 46,000 workers. In addition, \$62.7 million in TAA program funds were allocated to cover the costs of training and job search and relocation allowances for eligible workers. This compares to \$54.4 million in program funds that were allocated for these activities in FY 1988.

Preliminary reports also show that 15,232 workers entered training under the TAA program, 863 were provided job search assistance, and 989 received reallocation allowances in FY 1989. The numbers of workers were 10,000, 1,200, and 1,300, respectively, in FY 1988.

Research and Evaluation

Several important labor force trends, including the relationship between changing demographics and deficiencies in workplace skills, were identified in ETA-funded research in response to the Department's continued emphasis on addressing Workforce 2000 issues.

With the traditional source of new workers-- (nondisadvantaged 16- to 24-year-olds)-- shrinking, employers are having to reach into the ranks of the less qualified for entry-level workers, who generally have deficiencies in reading,

writing, and math. Increasingly, research shows that today's employers want employees with a sound grounding in basic reading, communication, and computation skills in addition to a wide range of other basic skills. These are the same skills, ETA research found, in which disadvantaged job entrants are most deficient.

Thus, employers are being forced to give closer attention to factors associated with illiteracy and often to provide additional training and human resource development if workers are to succeed on the job.

Specific research studies were implemented in PY 1988 to identify more clearly the extent of the literacy deficiencies that exist in the workplace. The first two in a series of publications were issued, describing (a) workplace basics and the skills employers need and expect from workers at entry and (b) the changing skill requirements of small and large employers and the extent of upgrading that has taken place through formal and informal training.

ETA also released a study on jobs and literacy that provides practical guidance to States and organizations interested in adopting coordinated statewide policies aimed at raising workforce literacy levels. Other workforce literacy projects evaluated various training strategies to assist in the improvement of reading and math skills of current and future workers through the utilization of computer-assisted technologies.

Studies were undertaken or continued in other key employment-related areas including: industrial occupations and worker dislocation, the employment situation of black and Hispanic men, trends and options for change in low-wage jobs, exemplary practices linking job creation to economic development, and the value of various child care arrangements that have been utilized by private and public sector employers in order to improve the recruitment, retention, and productivity of skilled employees.

In PY 1988, ETA began several new evaluation projects. These included case studies of exemplary dislocated worker projects under JTPA Title III and of exemplary Private Industry

Councils, an assessment of coordination of various components of JTPA and related programs at the State and local level, a study of the quality of training in JTPA Title II-A, and another of JTPA staffing and staff training at the State, SDA, and service provider levels.

ETA continued its field implementation in 15 service delivery areas of a major social experiment to measure the net impact of JTPA Title II-A programs on participants. The six-year study focuses on the labor market experience of JTPA participants and includes random selection as part of its experimental design. The agency continued to fund the Job Training Quarterly Survey, which monitors JTPA program participants on an ongoing basis, and published a compendium of JTPA evaluation studies completed during the July 1986-September 1988 period.

Policy and Planning

Much of ETA's PY 1988 policy and planning activities was directly related to the agency's research findings and focused on developing legislative proposals to amend the Job Training Partnership Act, proposals that would address the urgent need to develop the skills of the most disadvantaged members of the American work force.

While recognizing the excellent record of JTPA programs, the Department decided to take stock of the first five years of experience under JTPA with the objective of identifying the basic policy issues that should be addressed in charting the future course of the Federal training program. The hoped-for result would be service to more of the least skilled, particularly the young and disadvantaged entry level workers.

To inaugurate this effort, the Secretary of Labor appointed a 38-member advisory committee whose members had broad experience in the employment and training field and charged them with reviewing the JTPA experience and advising the Department on future directions. The panel, which held its first meeting in July 1988, included employment and training experts from business, labor, education, community-based organizations, veteran groups, public interest groups, and the

employment and training system itself.

ETA provided staff support to the committee and prepared a "white paper" which was published in the Federal Register. The paper identified specific issues to be considered by the committee and formed the core of the agenda for State and regional meetings held around the country to discuss the future of the job training program.

Based on public comments on the white paper and its own extensive deliberations, the advisory committee issued in March 1989 "Working Capital: JTPA Investments for the 90's," a 36-page report which summarized the committee's review of JTPA. The report endorsed the program's basic mission and management structure, but contained a series of recommendations for improving the quality and effectiveness of the program.

These recommendations provided the foundation for the Administration's bill to amend JTPA: the Job Training Partnership Act Amendments of 1989 which was transmitted to Congress in June 1989. ETA staff assisted in drafting the bill and prepared associated issue papers.

The proposed legislation will improve the targeting of JTPA programs to those most in need or at-risk, enhance the quality of JTPA services, and promote coordination of human resource programs serving the disadvantaged. It would create a national program of Youth Opportunity Unlimited (YOU) grants to target comprehensive services to youth living in high poverty areas and establish a year-round youth program of education, training, and work experience.

The Secretary of Labor testified at House and Senate hearings on the proposal, and agency staff provided policy and technical assistance to Congressional members and staff.

ETA staff also provided assistance to the Family Support Administration (FSA) of the Department of Health and Human Services in planning for the implementation of the new Job Opportunities and Basic Skills Training (JOBS) program. ETA worked with FSA on the development of regulations, an interagency training and technical assistance agreement, performance standards, and research and development efforts.

The agency developed implementation policy guidance for the new Economic Dislocation and Worker Adjustment Assistance Program (JTPA Title III), the trade adjustment assistance amendments contained in the Omnibus Trade and Competitiveness Act of 1988, and the Worker Adjustment and Retraining Notification Act of 1988, which requires employers with 100 or more workers to provide 60 days advance notice of a plant closing or mass layoff. ETA officials also participated in numerous congressional oversight and legislative hearings on such subjects as employment in the year 2000, labor shortages, and the utilization of the older work force.

Federal Oversight

ETA continued monitoring JTPA, Wagner-Peyser Act (the public employment service), and Trade Act activities, utilizing a system of compliance, program, and management reviews.

For JTPA activities, the system encompassed compliance reviews which covered program management and services, administrative and financial systems, and the Summer Youth Employment and Training Program; management reviews; and implementation/status reviews of Title III national reserve projects for dislocated workers.

For Wagner-Peyser programs, the monitoring consisted of compliance reviews of Wagner-Peyser base grants, employment service cost reimbursable grants, and the financial and administrative systems of State employment security agencies. Trade adjustment assistance programs operated under the Trade Act were monitored by means of program reviews which, among other areas, looked closely at implementation of the new TAA provisions.

This degree of oversight resulted in ETA regional office staff conducting over 380 State level and some 800 sub-State level reviews.

Financial and Administrative Management

During FY 1989, 359 final determinations, decisions, and responses to waiver requests were issued by ETA in regard to audits of contracts and grants funded by the agency. ETA

closed 273 contracts and grants during the year. Closeout actions remaining in pending status were those for which the contracting officer's final determination or decision had been appealed, other audit issues were unresolved, debt collection actions were ongoing, or requests were pending for establishment of indirect cost rates.

On-site program and fiscal reviews were conducted independent of program office activities on a sample of 36 national office programs. These reviews focused on program operations and financial systems. Issues of concern were misclassification of costs, lack of cost allocation plans, inadequate documentation for verification of participant eligibility, and failure to follow government travel regulations. The grantees were notified of the findings and requested to take corrective action.

During FY 1989, the Special Review and Internal Control unit conducted 16 internal control reviews, surveys, and management reviews in the process of carrying out ETA's responsibilities under the Federal Managers' Financial Integrity Act. In addition, a total of 914 preaward reviews were completed on potential ETA contractors or grantees, and 16 investigations, either internal or external, were conducted to determine compliance with applicable legislative and regulatory requirements.

Approximately 320 incidents of alleged fraud, abuse, or other criminal activity were reported through the ETA Incident Report system or the General Accounting Office/Office of Inspector General Hotline system during FY 1989. Where appropriate, corrective action was initiated.

In fiscal year 1989, ETA collected approximately \$19.6 million in cash and UI Trust Fund transfers for debts established through the audit resolution and closeout process. To enforce collection for those debts that are difficult to collect, the agency referred an additional \$1 million in debts to the Department of Justice for litigation or other action.

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Bureau of Labor Statistics

In fiscal year 1989, the Bureau of Labor Statistics continued to produce and improve the quality of the national economic indicators and other essential statistics on employment, employment projections, unemployment, prices, compensation, working conditions, productivity, and technology. During the year, the Bureau:

- Initiated important work to improve the household and establishment surveys, completed a survey of employers' anti-drug programs, and prepared special reports to Congress on the labor market status of older workers and Vietnam-era veterans.
- Completed its biennial revision of projections of the labor force and industry and occupational employment, including three alternative projection scenarios covering the 1988-2000 period.
- Launched a long-term revision process which will substantially improve International Price data, developed new service sector indexes for both the International Price and Producer Price Index programs, and accelerated the monthly release schedule for the Consumer Price Index.
- Added numerous wage and compensation change series to the Employment Cost Index, continued to implement plans for a new survey of white-collar pay and benefits requested by Congress, and completed the initial phase of a comprehensive redesign of the occupational illness and injury statistical system.
- Published a study of the effects of research and development on productivity growth, completed labor and multifactor measures for additional industries, updated productivity measures for foreign countries, and introduced measures of hours worked in place of hours paid.
- Used its new Collection Procedures Research Laboratory to refine data collection methods.

Employment and Unemployment Statistics

As 1990 approached, the work to improve the Current Population Survey (CPS) took on special urgency. Because the next opportunity to make significant improvements in this program will be after the decennial census, it was necessary to coordinate important planning in 1989. To specify the duties and expectations of the three agencies in this project, a memorandum of understanding was developed among BLS, the Census Bureau, and the Office of Management and Budget. Guided by this understanding, the Bureau made use of its new collection procedures laboratory to complete several CPS questionnaire improvement projects and to resolve many difficult measurement issues. As a result, the Bureau prepared two alternative questionnaires for field testing. The achievements of and plans for the CPS redesign were the subject of a paper, "A Current Population Survey for the Twenty-First Century," presented at the Census Annual Research Conference.

The Bureau also launched an important nationwide initiative to improve the statistical basis for establishment surveys. The Business Establishment List improvement project will generate a consistent establishment-level sampling frame for use by the entire Federal statistical system, eventually leading to a further upgrading of the timeliness, quality, and detail of data based on employer surveys. Among the significant strides taken toward completing this long-term improvement project were the design of a standardized statistical supplement for use by cooperating State employment security agencies, formation of an implementation consultation group under the aegis of the Interstate Council of Employment Security Administrators, circulation of technical instructions, and disbursement of funding for State agencies to carry out their roles in the Business Establishment List process.

Other significant accomplishments on the part of the Office's continuing data programs are:

- The Universe Maintenance System, the base from which the Business Establishment List is

building, converted the 5 million units on its file to the 1987 Standard Industrial Classification and surveyed 1.7 million employers to validate industrial codings.

■ The Local Area Unemployment Statistics program completed nationwide implementation of the variable-coefficient models for estimating employment levels and unemployment rates in the 39 States (plus the District of Columbia) that cannot derive their unemployment rate directly from the Current Population Survey.

■ The Mass Layoff Statistics program conducted a complete review of its program, with the help of the State agencies, the Bureau's advisory councils, and the Employment and Training Administration. The results were used to plan program modifications for implementation by the States.

■ A pilot study confirmed the feasibility of collecting wage data in the Occupational Employment Survey.

■ Bureau staff completely reprogrammed the data-capturing phase of the national, State, and local area macrodata time series systems and databases.

■ A special task force completed a quick-response survey of employers' anti-drug programs and submitted the results and an analytical summary to the Department of Labor.

■ Labor Force analysts prepared two special reports to Congress--one on the labor market status of older workers, the other on Vietnam-era veterans. Members of the staff also worked closely with the Department of Labor Older Worker Task Force to produce two reports detailing the labor market problems of older workers.

■ Staff economists won the Lawrence R. Klein Award for a *Monthly Labor Review* article which analyzed the hypothesis of a declining middle class.

Prices and Living Conditions

The Bureau continued its efforts to improve the quality, timeliness, and analysis of price data. The International Price program began a 4-year revision process which will substantially improve its data. The objectives of the revision are to make the program's sample more representative by shortening the period of resampling, to publish indexes for country or region of origin for some U.S. imports, and to publish aggregate level indexes monthly for both imports and exports. Publication of some monthly indexes began this year.

As a result of improved data processing implemented during the recent Consumer Price Index Revision, the Bureau now releases the CPI 2 days earlier each month. As the first phase of applying new computer-assisted telephone interviewing procedures to CPI data collection, the Bureau collected rent information from some 800 units. The Consumer Expenditure Survey program also began using a new technique--cognitive research--to improve the questionnaires for both the Diary and Quarterly Interview Surveys.

Using sophisticated econometric techniques, the Producer Price Index program developed price indexes for the technologically complex Electronic Computer industry. The PPI program also introduced a new seasonal adjustment methodology for petroleum products.

The Bureau initiated joint analysis of the relationships among price changes for selected series in the Consumer Price Index, Producer Price Index, and International Price programs to explain the similarities and differences in the observed price changes for the same products in different markets. BLS released new service sector indexes for both the Producer Price Index and International Price programs.

Compensation and Working Conditions

The Employment Cost Index (ECI) added several new wage and compensation change series, including general merchandise stores in private industry and educational services and colleges and universities in both private industry and State and local governments. Using funds provided by the Aerospace Industries

Association, the ECI program also began publishing series on compensation trends in the aerospace industry. The Bureau continued testing and preparatory work for the planned integration in 1990 of the Employment Cost Index and the Employee Benefits Survey. In addition, BLS has nearly completed the work necessary to rebase ECI indexes to June 1989=100. This rebasing--scheduled for 1990--will assure that indexes are available for all published series. The Employment Cost Index program published the first of what is to be an annual bulletin on *Employment Cost Indexes and Trends*. The bulletin provides complete historical data on the ECI as well as data on employer costs for employee compensation, an analysis of the data, a description of the survey, and discussions of estimation methods and measures of precision. Bureau staff developed an article, "Measuring the Precision of the Employment Cost Index," which appeared in the *Monthly Labor Review*. The article provided the first variances on ECI estimates of over-the-year wage and compensation changes.

The Bureau continued to improve the methods and scope of several other compensation surveys:

- The Employee Benefits Survey concluded the second phase of its white-collar pay and benefits survey expansion by reporting on benefit plan provisions in establishments employing 100 or more workers in all private nonagricultural industries. Bureau staff also completed plans for the third phase, which will inaugurate a survey of private establishments employing fewer than 100 workers.
- Activities to convert the Area Wage Survey program from 70 to 90 areas continued.
- To improve the efficiency of survey operations and conserve resources, Bureau staff coordinated data collection activities for the white-collar pay survey with other wage surveys. Work also continued on development of the Bureau's new, broad-based survey of white-collar pay and benefits to cover more occupations,

nonwage cash benefits, and demographic characteristics.

■ The Bureau published results of a first-time survey on white-collar pay in the service-producing industries.

After evaluating some one dozen feasibility studies and fielding five pilot tests, the Bureau completed the initial phase of a redesign of the occupational injury and illness statistical system. The redesigned system will uniformly detail, for the first time, the characteristics of injuries and illnesses and the demographics of workers involved. In addition, the incorporation of current consensus recommendations by safety and health experts, such as those featured in the 1989 Keystone Center report, will improve survey concepts and definitions.

BLS published a comprehensive bulletin which provides nationwide results of the latest Annual Survey of Occupational Injuries and Illnesses. The survey results reflect, in part, a continuing effort by the Bureau's staff to review and improve employer recordkeeping practices. Using data from the Annual Survey and from a Supplementary Data System based on State workers' compensation records, BLS staff developed separate estimates for most States and territories. Bureau staff also prepared a series of *Monthly Labor Review* articles profiling work in individual industries--such as meatpacking and longshoring--where high rates of injuries and illnesses traditionally occur.

The Bureau published a wide range of information on collective bargaining and industrial relations, including data on the size of major collective bargaining settlements, on major work stoppages, and on labor organization membership. The Bureau also published an analysis of key bargaining situations with contract negotiations scheduled during the year and information about deferred wage changes and potential cost-of-living adjustments in major contracts. As part of a comprehensive review of measures of employee compensation, Bureau staff developed a method to include lump-sum payments in statistics on the size of major collective bargaining settlements.

Productivity and Technology

Interest in BLS productivity and costs measures continued to grow as the public became increasingly concerned with the competitiveness of the United States economy. Productivity measures are widely regarded as significant indicators of U.S. economic progress and of the ability of domestic producers to compete abroad. The Bureau continued to refine and extend its published measures to assist in the understanding of these economic trends.

Additional industries for which BLS published labor productivity measures were: agricultural chemicals (5 measures); carburetors, pistons, and valves; variety stores; and auto and home supply stores. The Bureau now issues a total of 170 separate productivity measures in the manufacturing, mining, transportation, trade, communications, and service sectors of the economy.

The Bureau also made progress in measuring productivity in the Government sector, updating measures for the Federal Government to fiscal year 1988. These measures currently include 21 years of historical data for 28 functional groupings of Federal agencies, representing 69 percent of the Federal civilian work force. In addition, BLS updated measures for several State and local government activities.

The Bureau made substantial progress in the measurement and interpretation of multifactor productivity trends, including extending through 1986 its multifactor measures for 2-digit manufacturing groups. In addition, BLS expanded its program of multifactor productivity estimates at the individual industry level, publishing measures for footwear and tires and tubes.

A multi-year project to evaluate the impact of research and development spending on productivity change culminated in the publication of a bulletin presenting the findings of this research. In another research effort, relying on data gathered in a specially-designed questionnaire, the Bureau introduced measures of labor input using an hours-at-work concept. The Bureau also issued research studies on the measurement of

capacity utilization and on the effects of energy price increases on manufacturing productivity.

In the international area, BLS updated trends in manufacturing labor productivity and unit labor costs for 12 countries, and added Korea and Taiwan to the coverage of unit labor cost measures. The Bureau also updated the measures of comparative levels of hourly compensation costs for production workers in 34 countries or areas and 40 manufacturing industries as well as the series on international comparisons of labor force, employment, and unemployment in 10 industrial countries. These measures provide insights into the changing competitive position of the United States.

In response to continued public interest, the Bureau assessed the employment implications of automation and other technological changes. Analysts prepared reports appraising the impact of major technological changes on productivity, employment, and occupational requirements over the next 10 years for four additional American industries--electric and gas utilities, hotels and motels, retail trade, and telephone communication.

Employment Projections

The Bureau continued to improve the quality of information on future employment trends developed for the use of education planners, Government officials, guidance counselors, and individuals planning their careers.

Analytical efforts focused on revising projections of the labor force, industry employment, and occupational employment to the year 2000. In this work, improvements were made in the methods of estimating future entrants to the labor force by age, sex, race, and Hispanic origin and in estimating changes in the occupational staffing patterns of industries. The Bureau expanded coverage of managerial occupations and administrative support occupations, including clerical, for publication in the 1990-91 edition of the *Occupational Outlook Handbook*.

The *Occupational Outlook Quarterly* featured articles on the causes of labor shortages and labor market adjustments to occupational shortages, the pros and cons of choosing a career

in nursing, and on artificial intelligence. The periodical also included articles on job opportunities for construction managers, administrative services managers, budget analysts, and engineering, science, and data processing managers. Using data obtained from a supplement to the Current Population Survey, a *Monthly Labor Review* article presented an analysis of the factors underlying differences in the patterns of tenure among occupations.

Technology

The Bureau completed transfer of its remote computing services contract to a new vendor. All systems installed at the former site were transferred with no delay of normal production schedules.

The Bureau added new technologies to the BLS Local Area Network (LAN) to increase the reliability of components or segments of the system which support uses by critical statistical programs such as the International Price Program. These additions enable the Bureau to make improvements to the LAN more cost effectively than if the entire LAN system had to be improved to meet the needs of specific programs.

The Bureau purchased a system that will be used to automate the production of its publications. This system also will provide the Bureau with the capability to produce documents in the Government standard Computer-aided Acquisition and Logistic Support program format and will support electronic distribution.

Publications

The *Monthly Labor Review* entered its 75th year of continuous publication with design changes and special articles.

The Bureau published the 1989 edition of the *Handbook of Labor Statistics*, a 585-page historical compendium of major BLS statistical series.

The Bureau produced a 9-minute video show, "The Power of Numbers," for use in recruiting, orientation, and public dissemination of BLS data.

The National Association of Government Communicators

presented an award of excellence to the 1988-89 *Occupational Outlook Handbook*. Three other Bureau publications--the *Occupational Outlook Quarterly*, the *Monthly Labor Review*, and the chartbook, *Productivity and the Economy*--won a total of four prizes in the 1988-89 competition sponsored by the Washington, D.C., chapter of the Society for Technical Communication. In addition, the 1988 issues of the *Occupational Outlook Quarterly* won top honors among periodicals in the Society for Technical Communication's international contest.

Occupational Safety and Health Administration

In FY 1989, OSHA made major advancements in improving worker safety and health. OSHA finalized 6 new and significant safety and health standards, and 13 new occupational hazards were the subject of proposed standards. One final rule, Air Contaminants, reduced and updated permissible exposure limits (PELs) for chemicals already regulated by OSHA and established PELs for more than 164 substances that were not previously regulated by OSHA. In addition to providing increased on-the-job protection for more than 21 million workers, this rule represents a major departure from OSHA's traditional approach of individual rulemaking for each substance.

In FY 1989, OSHA also established the Office of Construction, Maritime and Health Engineering Support to provide information and support on construction, maritime and health engineering activities. This office serves as a focal point for industry, labor and other interest groups on OSHA construction and maritime safety programs.

The office also provided engineering support for a number of enforcement activities, including investigations of the collapse of a 2,000-foot tower involving five fatalities, an explosion and fire at a major oil refinery, and a fire in a Federal office building.

OSHA also participated in the International Labor Organization (ILO) conference in Geneva on "Safety in the Use of Chemicals at Work." The ILO is developing worldwide guidelines on classifying and labeling chemicals. The OSHA standard on hazard communication is one of the alternatives being considered. Because of the potential impact of labeling requirements on international trade, OSHA is working with the ILO and other member nations, notably Canada and the European Community, to retain uniformity between the classification and labeling systems.

The agency continued to provide free on-site consultation

and education and training programs as well as enforcing compliance and monitoring state safety and health programs.

Standards Setting

The OSH Act authorizes OSHA to promulgate occupational safety and health standards. In so doing, OSHA continued efforts to produce standards that are protective, flexible, and cost-effective as well as technologically feasible. These efforts are reflected by the standards published during the year.

Safety Standards

In the area of safety standards, FY 1989 was the most productive year since OSHA's inception. Four final rules and 10 proposed rules were published. Following is a brief summary of each:

Final Rules

1. On September 1, 1989, OSHA published a final rule on the Control of Hazardous Energy Source (Lockout/Tagout) (29 CFR 1910.147). This standard establishes practices and procedures necessary to disable machinery or equipment and to prevent the release of potentially hazardous energy during maintenance and servicing. The standard requires that lockout be used for equipment that is designed with a lockout capability (except when the employer can demonstrate that the use of tags provides full employee protection). For equipment not designed to be locked out, the employer may use tags.

This final rule applies to general industry employment under 29 CFR Part 1910. Employment in maritime, agriculture, construction, oil and gas well drilling, the generation, transmission and distribution of electric power by utilities, and electrical work on electric conductors and equipment will be covered by a separate rule.

2. On March 6, 1989, OSHA published a final rule on Hazardous Waste Operations and Emergency Response

(29 CFR 1910.120). This final rule replaces the existing interim final rule (promulgated December 19, 1986) required by Congress and the Superfund Amendments and Reauthorization Act of 1986.

This rule regulates the safety and health of employees involved in clean-up operations at uncontrolled hazardous waste sites under government mandate, in certain hazardous waste treatment, storage, and disposal (TSD) operations conducted under the Resource, Conservation and Recovery Act of 1976 as amended, and in any emergency response to incidents involving hazardous substances.

This standard provides employee protection during initial site characterization and analysis, monitoring activities, materials handling activities, training, and emergency response.

3. On July 28, 1989, OSHA amended the standard for Powered Platforms for Building Maintenance (29 CFR 1910.66, Subpart F) to allow the use of alternative stabilization systems. A powered platform is a suspended, manned platform that is installed on a building and is used to maintain the building facade. This installation consists of the working platform, means of suspension, fall arrest systems, and the requisite operation and control devices.

An earlier interim rule allowed only stabilization systems that provided continuous positive means of engagement between the platform and the building facade. These types of systems, however, were shown to be infeasible for use on many new buildings with discontinuous vertical facades. Now the rule allows the use of other stabilization systems that are compatible with the discontinuous vertical facades.

In addition, the amendment updates existing requirements using performance-oriented language, expands coverage to interior installations, and includes requirements for emergency planning, employee training, and personal fall protection for employees.

4. A revised final rule on Underground Construction (29 CFR 1926.800) was published on June 2, 1989. This revision clarifies the existing standard, covers hazards not addressed previously, and reflects the current technology and methods used in underground construction.

Proposed Rules

1. On January 31, 1989, OSHA published a proposed rule on Electric Power Generation, Transmission and Distribution (29 CFR 1910.269); Electrical Protective Equipment (29 CFR 1910.137). This proposal identified work practices to be used during the operation and maintenance of electric power generation, transmission, and distribution facilities. The proposal includes requirements relating to confined spaces, hazardous energy control, working near energized parts, grounding for employee protection, work on underground and overhead installations, work in substations and generating plants, and other special conditions and equipment.

OSHA is proposing to apply these new requirements only to electric utilities, but is considering extending the scope of the standard to all electric power generation, transmission, and distribution installations. Compliance with these requirements will prevent injuries to employees working on electric power systems.

Also, this proposal would revise the electrical protective equipment requirements contained in the General Industry Standards by replacing existing out-of-date consensus standards with a set of current performance-oriented requirements. Additionally, OSHA is proposing new requirements for the safe use and care of electrical protective equipment to complement the equipment design provisions. These revisions will update the existing OSHA standards and will prevent accidents caused by inadequate electrical protective equipment.

2. On May 2, 1989, OSHA issued a proposed rule on Logging Operations. This standard would revise existing standards on pulpwood logging in 29 CFR 1910.266. This coverage is extended to provide protection to loggers in the industry who are not covered by the existing standard. The proposed rule addresses the unique hazards found in logging operations, and supplements other general industry standards in 29 CFR Part 1910. The proposal also requires training of employees in this labor-intensive industry. OSHA expects that compliance with these requirements would result in a significant decrease in the number of deaths and injuries occurring in this industry.
3. On June 5, 1989, OSHA published a proposed rule on Permit Required Confined Spaces (29 CFR 1910.146). This proposal would establish safety requirements, including a permit system for entry into those confined spaces posing special dangers. The proposed rule introduces the term "permit required confined space" to cover the particular confined spaces that are to be regulated.

Few OSHA standards address confined space hazards in general industry, and these provide only limited protection. OSHA has determined, based on its review of the Agency's fatality and injury data, enforcement experience and other information, that the existing standards do not adequately protect workers in confined spaces from atmospheric, mechanical, and other hazards. The Agency has further determined that the ongoing need for monitoring, testing and communication in confined spaces requiring entry permits can be satisfied only through the implementation of a comprehensive confined space entry program. OSHA anticipates that compliance with the provisions of this proposed standard would effectively protect employees who work in permit-required confined spaces from injury and death.

4. On August 16, 1989, OSHA published a proposed rule covering Personal Protective Equipment for General Industry (29 CFR 1910.132 through 1910.140). This proposal would revise portions of the general industry safety standards on personal protective equipment (PPE).

The existing PPE standards apply to all general industry places of employment and regulate the design, selection, and use of eye, face, head and foot protection. Many of these standards are design restrictive, and/or outdated, and must be supplemented by administrative action to permit the use of more recently developed PPE that provides equivalent or better protection. In addition, the existing standards do not always provide clear requirements for the selection and use of PPE.

OSHA would delete, where appropriate, existing specification provisions and use performance-oriented provisions to address hazards to the eyes, face, head and feet. The agency would also update the general industry PPE standards, where appropriate, to provide clearer requirements and guidance for the selection and use of PPE.

In addition to the above proposed standards, OSHA proposed for revisions, on November 29, 1989, six Shipyard Employment Safety Standards. The existing shipyard employment standards (29 CFR Part 1915) apply to shipbuilding, ship repairing, and shipbreaking operations. The present standards in Part 1915, however, are not comprehensive in their coverage of shipyard hazards, and are supplemented by the general industry standards (29 CFR Part 1910), as necessary, to provide complete coverage.

The following proposed rules are six of a series of proposals that are intended to revise Part 1915 to provide comprehensive coverage of shipyard employment solely within this part:

1. Access and egress requirements.

2. Explosive and other dangerous atmospheres in vessels and vessel sections.
3. Fall protection.
4. Personal protective equipment.
5. Shipyard standards for scaffolds used.
6. Welding, cutting, and heating.

Health Standards

In addition to the success of the safety standards area, the following paragraphs summarize the equally successful health standards activity and related accomplishments made during the fiscal year.

Final Rules

1. On January 19, 1989, OSHA published a final standard on Air Contaminants (29 CFR 1910.1000). This standard reduced and updated PELs for chemicals already regulated by OSHA and established PELs for more than 164 substances that were not previously regulated by OSHA. This action represents one of the most extensive rulemakings ever undertaken by OSHA. In the past, OSHA addressed toxic chemical regulations one at a time, but this standard established new limits for more than 376 substances in one regulatory action. The new standard provides coverage for more than 21 million workers potentially exposed to the air contaminants.
2. OSHA promulgated its final standard on occupational exposure to lead (29 CFR 1910.1025) in November 1978; the standard was partially stayed and was the subject of several legal challenges brought by industry and labor. On August 15, 1980, the U.S. Court of Appeals for the District of Columbia upheld the lead standard in most respects. The Court found, however, that OSHA had failed to present substantial evidence to support the feasibility of the use of engineering and work practice controls to achieve the PEL of 50 micrograms per cubic meter of air (50 ug/m³) in nine industries: brass and

bronze ingot production, independent battery breaking, lead chemicals, lead chromate pigments, leaded steel, nonferrous foundries, secondary copper smelting, shipbuilding and ship repair, and stevedoring.

In a final action on July 11, 1989, OSHA demonstrated that compliance with the lead standard is both technologically and economically feasible for eight of the nine industries. For the ninth industry sector, nonferrous foundries, OSHA found engineering controls are technologically feasible but economically infeasible. OSHA now plans to determine whether engineering controls are economically feasible at some level between the current 200 $\mu\text{g}/\text{m}^3$, which nonferrous foundries must achieve, and the 50 $\mu\text{g}/\text{m}^3$ level set for all other industries.

Proposed Rules

1. On May 30, 1989, OSHA published a proposed rule on Occupational Exposure to Bloodborne Pathogens (29 CFR 1910.1030). The proposal is designed to protect more than five million workers against the hazards of AIDS and hepatitis B viruses and other bloodborne disease-causing viruses. The workers covered include those in hospitals, physicians and dentists' offices, clinics, nursing homes, blood banks, law enforcement, fire and rescue, correctional facilities, research laboratories, and the funeral industry.

This proposal provides protection through the use of engineering and work practice controls, personal protective equipment, training, medical follow-up of exposure incidents, hepatitis B vaccination and other protective provisions. This proposal represents OSHA's first rule on occupational exposure to biological hazards.

2. OSHA published a proposal, Methods of Compliance (29 CFR 1910.1000e), on June 5, 1989, to address existing requirements on the use of engineering controls and respirators to control employee exposure to air

contaminants. In general, OSHA prefers engineering controls over respiratory protection; however, the Agency realizes that there are instances where respiratory protection is more feasible. This proposal includes five circumstances where respirators may be used instead of engineering controls. They are: (1) during the time needed to install feasible engineering controls; (2) where feasible engineering controls result in only a negligible reduction in exposures; (3) during emergencies; life saving or recovery operations; and repair, shutdowns and field situations where engineering controls usually cannot be implemented; (4) for operations requiring added protection when there is a failure of normal controls; and (5) for entries into unknown atmospheres.

3. On May 12, 1989, OSHA published a proposal on 4,4'-Methylenedianiline (MDA) (29 CFR 1910.50 and 1926.60), a substance that is a potential human carcinogen and liver toxin. The proposal represents OSHA's first successful attempt at mediated rulemaking. It limits exposure to 10 parts of MDA per billion parts of air (10 ppb) averaged over an 8-hour day and establishes a short-term exposure limit (STEL) of 100 ppb. The proposed rule includes an action level of 5 ppb and other requirements such as medical surveillance, exposure monitoring, hygiene facilities, engineering controls and work practices, proper respirator use, and recordkeeping. The proposal also includes separate requirements for general industry and for construction.

Compliance and Related Activities

In FY 1989, OSHA conducted a total of 50,416 inspections. OSHA's Directorate of Compliance Programs coordinated 22 major enforcement cases involving significant proposed penalties that required the decision of the Assistant Secretary. These included:

■ A major inspection of John Morrell & Co., Sioux Falls, SD, resulting in \$4.3 million in proposed penalties for serious ergonomic and other safety and health hazards to employees; and

■ Significant enforcement actions imposed against Friction Division Products, Trenton, NJ, included proposed penalties of \$2.7 million for willful violations relating to asbestos exposure and actions in U.S. courts to compel the company to immediately cease exposing employees to serious asbestos hazards.

In June 1989, the agency announced, in congressional testimony, that it was beginning a National Special Emphasis Program for the meatpacking industry. The program will focus on ergonomic hazards such as carpal tunnel syndrome and other cumulative trauma disorders. Ergonomic program guidelines will also be developed and distributed to all employers in the red meat industry. Also, in FY 1990, OSHA plans to implement an inspection program in the meatpacking industry.

OSHA also reached corporate-wide settlement agreements with several large companies, i.e., Iowa Beef Products, Inc., Sara Lee, and International Paper Products, Inc., to resolve major citations and to provide for abatement of hazards in their worksites.

The agency also published a major revision of its *Field Operations Manual*, the primary guide for all enforcement activities, to incorporate policy, procedural and administrative changes such as the enhancement of its records-check program and computerization of construction inspection scheduling.

Additionally, a major effort to coordinate the enforcement of the agency's asbestos standard is underway, including a directive to OSHA's field staff. Jurisdictional issues of Emergency Response, Hazardous Waste and Pesticides are being coordinated with the Environmental Protection Agency. Draft guidance on these issues is being developed for the use of agency enforcement staff.

Agency staff also completed the investigation of some 3,550 alleged discrimination cases in fulfilling OSHA's

responsibilities under Section 11(c) of the OSH Act and Section 405 of the Surface Transportation Assistance Act, which ensures that employees are not discharged or discriminated against for filing safety or health complaints.

The Office of Construction and Maritime Compliance Assistance identified the following two Environmental Protection Agency projects that OSHA will assist.

■ **The Leaking Underground Storage Tank Inspection and Abatement Program.** This program requires assistance from OSHA for the training of inspectors on trenching and excavation safety and hazard recognition, and on the interpretation of standards that affect these activities. Initial contacts have been made and a formal request for assistance is expected within the first quarter of FY 1990.

■ **Hazardous Waste Removal Assistance Project.** This project requires assistance on compliance and interpretations of standards involving construction-related activities at waste sites (i.e., scaffolding, shoring, heavy equipment, excavation hand tools, and materials-handling equipment).

The Maritime staff participated in the Joint United States and Japan International Technical Meeting on Diving in Polluted Water and reviewed the Commercial Diving Standards.

Federal Agency Programs

Since 1983, when President Reagan established the goal for reducing Federal workplace injuries and illnesses by 3 percent per year for 5 years, Federal agencies made considerable progress in reducing occupational injuries and illnesses in their workplaces. Of the 15 largest agencies, OSHA found that 4 exceeded the 15-percent reduction called for in this goal. They were: the Tennessee Valley Authority, National Aeronautics and Space Agency, Veterans Administration, and United States

Postal Service. Six other agencies and departments managed to reduce their case incidence rate by a percentage less than the 15 percent.

In the 5 years for which there are figures, there were almost 45,000 fewer injury and illness cases compared with the 1982 base year level. Each case represented an injury or illness that did not occur, productivity that was not lost, suffering and hardship that was not experienced, and financial cost that was not expended. By applying a model developed by the Veterans Administration, OSHA calculated that these 45,000 fewer cases represent a cost savings of over \$100 million.

OSHA provided assistance to Federal agencies in the areas of training, consultation, targeting, evaluation, enforcement and incentive programs. OSHA completed evaluations of the safety and health programs of the Department of the Interior and the Department of Housing and Urban Development and began, at the request of Senator Carl Levin, an evaluation of the Department of Defense's Chemical and Biological Research Program. OSHA conducted approximately 1,400 inspections in Federal agencies. More than 900 agency Federal safety and health managers, collateral duty safety and health officers, and union representatives attended the 43rd Annual Federal Safety and Health Conference in Orlando, FL, October 30 through November 1, 1988. The conference provided a forum for presenting information and ideas to agencies in developing programs to help ensure safety and health protection for Federal employees.

The Secretary of Labor chartered three new Federal Safety and Health Councils (FSHC). These voluntary organizations are set up to bring the safety and health personnel of local Federal agencies together to encourage communications, the sharing of expertise, and mutual assistance on matters relating to occupational safety and health. The FSHC's chartered were Kanto Plain (Japan), Channel Islands (California), and the U.S. Virgin Islands.

State Plans

Section 18 of the Occupational Safety and Health Act of 1970

provides that a state or territory that wants to assume responsibility for its own safety and health program may submit for approval to OSHA a State plan that provides for the development and enforcement of safety and health standards. At the end of FY 1989, 25 states and territories administered their own OSHA-approved State plans. Twenty-one states and two jurisdictions administered plans covering both private sector and State and local government employment; two states--New York and Connecticut--covered only the public sectors.

In FY 1989, OSHA officials attended three meetings held by State plan officials to assist the States' continued involvement in policy initiatives and other matters of mutual interest. Interim meetings also were held with the Board of Directors of the State plan organization.

Key agency actions in the State program area during the fiscal year included:

- Granting final approval to the Virginia State Plan in November 1988. (Final approval had been previously granted to South Carolina in FY 1988; to Indiana in FY 1986; to Arizona, Iowa, Kentucky, Maryland, Minnesota, Tennessee, Utah, and Wyoming in FY 1985; and to Alaska, Hawaii, and the Virgin Islands in FY 1984). Final approval reflected OSHA's judgment that in actual operation the State plan is "at least as effective" as the Federal program.
- Developing a corrective action plan in response to recommendations from the Department's Office of the Inspector General (OIG) and the General Accounting Office (GAO) regarding OSHA's monitoring of State plan activities. Both the OIG and GAO reports found the present evaluation system conceptually sound, but made a number of observations and recommendations that OSHA will use as a starting point for a comprehensive review of its State plan monitoring and evaluation system.
- Coordinating with the California program in its phased resumption of private sector enforcement

coverage that began on May 1, 1989, and was scheduled for completion in early FY 90. (In November 1988, California's voters passed a ballot initiative mandating the restoration of a complete State plan. This ballot initiative reversed a 1987 decision to eliminate all state funding of the California occupational safety and health program. On March 30, 1989, OSHA and California signed a Memorandum of Understanding delineating areas of concurrent enforcement responsibility until the State plan became fully operational).

- Coordinating with Alaska to ensure protection of the workers cleaning up the March 24 oil spill in Alaska's Prince William Sound.

Voluntary Efforts

A key OSHA goal was to improve communication and coordination with employers and employees and to supplement enforcement efforts. The Consultation Program was one way OSHA assisted employers in identifying and correcting hazards and in developing effective management systems for preventing workplace hazards. Consultation services were provided primarily with Federal funds and at no cost to the employer.

During FY 1989, there were 7(c)(1) Cooperative Agreements in 46 states and jurisdictions. Eight states provided consultative services under their State plans. Targeted mainly to smaller employers in more hazardous businesses, consultation may cover all or part of the workplace, depending upon the employer's request. The service is administered by State agencies, including universities, as designated by the Governor of each State. The service is confidential and does not trigger a State or Federal inspection. The service is penalty free, but employers are required to take immediate action to eliminate employee exposure to imminent dangers and to correct identified serious hazards within a reasonable time. During FY 89, OSHA conducted more than 30,000 consultation visits.

Consultants continued to provide employers with safety and health program assistance and training upon request. The

program for "Inspection Exemption Through Consultation" continued, with 264 exemption certificates issued. These certificates were granted to small business employers who received a comprehensive consultation hazard survey, corrected all identified hazards, and demonstrated that an effective safety and health program was in operation.

During FY 1989, the Consultation Program implemented a program-wide data management information system. Forty-four of the 46 State 7(c)(1) projects and three of the eight 18(b) State plan projects established on-line communications with the OSHA mainframe computer and with OSHA's Salt Lake City Laboratory. By communicating with the OSHA mainframe computer, the consultation projects transmit key information on consultation project operations. This information is combined with the information on all consultation project operations to create a national database for consultation. At the Salt Lake City Laboratory, the consultation projects have access to OSHA's extensive technical information database to assist them in their work and also to an electronic mailbox for sending and receiving electronic mail. In addition, almost all consultation projects now routinely generate a semiautomated written report to the employer at the local level and are able to use the data to manage project operations based on information at the microcomputer level.

Consultants continued to support OSHA's special emphasis programs in trenching and ergonomics. Consultants provided special assistance to employers facing potential problems with issues such as the control of bloodborne diseases and compliance with the hazard communication standard. Assistance in developing effective safety and health management systems was emphasized in all consultation visits.

Voluntary Protection Programs

The Voluntary Protection Program (VPP) provides the opportunity for OSHA to expand its influence in workplaces beyond those targeted for enforcement. Through VPP, the Agency continued to reach those companies that were fully committed to employee safety and health and that were

incorporating those objectives in the daily operation of their workplaces.

The VPP consists of three separate programs. The Star Program recognizes worksites that provide outstanding safety and health protection to their employees. The Merit Program is a stepping stone to Star for worksites that are committed to providing the best worker protection and that are willing to work with OSHA as they improve their safety and health management. The Demonstration Program is designed for situations in which Star Program requirements may not be appropriate but where the company is interested in exploring the use of the VPP.

In FY 1989, there were 12 new approvals, 10 Star and 2 Merit. In addition, one site, which had been a participant in the Merit Program, was approved to become a member of the Star Program. Participants in the programs continued to avoid approximately 60 percent of the average lost-workday cases for their industries.

In FY 1989, OSHA continued to promote the VPP. A promotional kit, developed to assist in securing top management's interest in participation, was distributed nationwide. Demand was so great that a second printing was ordered. The newly developed videotape, "Partners in Safety," has aroused considerable interest in the program. It has been successfully shown nationwide and continues to be in heavy demand.

The VPP participants formed an association to exchange safety and health information and to promote the concept of the VPP. Their fifth annual conference was held in San Antonio in September 1989. Representatives of companies interested in applying to the VPP attended the conference to hear about the benefits of the VPP from companies already participating. Participants in OSHA's Region V formed a local chapter to further the goals of the organization. They have become the second region to form such a chapter.

Because OSHA became increasingly convinced, primarily as a result of its experience with VPP and consultation activities, of the value of management systems to eliminate or

control employee exposure to safety and health hazards, the Agency published final guidelines for general safety and health programs. Also, work began on developing training course materials and "How To" pamphlets for the private sector.

Training and Education

The OSHA Institute conducts training programs to improve the skills and knowledge levels of persons engaged in work covered by the OSH Act and to assist employers and employees in the recognition and elimination of occupational safety and health hazards.

In FY 1989, more than 7,000 Federal and State compliance officers, State consultants, safety and health representatives from other Federal agencies, and private sector personnel attended courses offered by the OSHA Training Institute in Des Plaines, IL.

Of the 70 courses offered, 18 were conducted at sites away from the Institute where training could be enhanced by actual or simulated workplace conditions. The Institute continued the program of offering shortened versions of regular courses designed specifically for non-compliance personnel. Courses in this series included Respiratory Protection, Principles of Ergonomics, and Hazardous Materials.

The Office of Training and Education provided regional offices with self-study programs on selected industrial processes for newly hired compliance officers. The programs, which consist of a text and videotape, address such processes as smelting and refining, electroplating, vapor degreasing, welding, soldering, and brazing. In addition, OSHA field offices were given revised training materials on AIDS and other bloodborne diseases.

The Training Institute continued to support other Federal agencies through regular training courses and by participating in cooperative training efforts. In conjunction with the Nuclear Regulatory Commission (NRC), the Training Institute presented several training programs on safety and health hazard recognition to NRC resident inspectors.

During FY 1989, nearly \$2 million was awarded under the New Directions grant program to 28 nonprofit organizations. This program provides funds to nonprofit organizations to develop the staff, skills, and services to become a competent, self-sufficient center for job safety and health. The grants support training and education projects that address serious problems in high hazard industries. Grantees may participate in the program for up to 5 years.

Also in FY 1989, 12 organizations that received grants under the Anti-Drug Abuse Act of 1988 to research effective workplace anti-drug abuse programs and to develop model programs completed their projects. Findings from their final reports will be summarized and submitted to Congress early in FY 1990.

Policy

During FY 1989, the OSHA Directorate of Policy and the Bureau of Labor Statistics continued work on the first major revision of the OSHA recordkeeping regulations since the establishment of the Agency. The revision includes a planned change in the forms maintained at the workplace and new guidelines on the data required to be kept by the employer.

The OSHA Task Force on the redesign of the BLS Occupational Safety and Health Statistical Survey completed a report presenting OSHA's assessment of the BLS proposal and OSHA's own data needs with respect to the survey redesign. In completing this report, pilot tests were performed in several states to investigate different collection techniques for the worker and case characteristic data and their costs.

In FY 1989, after 2 years of negotiations, OSHA and the Nuclear Regulatory Commission (NRC) signed a Memorandum of Understanding (MOU) to clarify the agencies' respective authorities for worker safety and health at NRC-licensed facilities. The MOU is intended to promote interagency coordination, prevent gaps in the protection of workers, and avoid duplication of effort.

In January 1986, a worker died from exposure to hydrofluoric acid at the Sequoyah Fuels Corporation nuclear

fuel facility in Oklahoma. This accident brought national attention to the practical difficulties in identifying the boundaries between the nuclear and radiological safety issues regulated by the NRC and the industrial safety issues regulated by OSHA. The agreement delineates each agency's general areas of responsibility and provides guidelines for staff training in hazard-recognition and for referrals of information about potential violations of each agency's standards. Under the MOU, OSHA agreed to make every effort to participate in interagency team assessments at NRC-licensed fuels and materials facilities and has participated in four such assessments in the past year.

Technical Support

During FY 1989, staff from OSHA's Salt Lake City Analytical Laboratory provided assistance to State and Federal agencies in analyzing difficult sample types, i.e. diisocyanates, silica, and chromates. Intensive training and laboratory tours were also provided for several governmental organizations and international visitors including scientists from West Germany, Canada, and the Republic of China.

In addition, OSHA's Technical Data Center (TDC) served other government agencies and the public with more than 2,500 computer searches and 2,300 docket office requests. TDC supports activities under Sections 6 and 7 of the Act namely, standards promulgation and advisory committee recordkeeping.

At the request of Congress, the Directorate of Technical Support also established an Occupational Health Nursing Program during the year. This program is designed to provide technical assistance on occupational health nursing to OSHA staff in program areas such as health standards development and field compliance. Since 65 percent of the occupational health nurses are the sole health care providers at their worksites and play an integral part of the safety and health team, it is important that their role be represented in the policy-setting and regulatory process at OSHA. Also, as a part of this program, a pilot occupational health nursing intern program began this fiscal year.

During FY 1989, OSHA also implemented a new program that evaluates, recognizes, and approves, as National Recognized Testing Laboratories, laboratory organizations that are interested in approving specific products for use in the workplace. Of the seven laboratories that submitted applications, three have been recognized: MET Electrical Testing Company, Inc., Dash, Straus and Goodhur, Inc., and ETL Testing Laboratories, Inc.

Employment Standards Administration

Accomplishments by the Employment Standards Administration (ESA) during FY 1989 continued to reflect the fundamental dedication to preparing for the future while improving effectiveness of its enforcement and service delivery. During the year, ESA's programs increased their enforcement and improved delivery of services to the public, initiated and revised regulations, and improved internal management to parallel changing workforce patterns.

Wage and Hour Division

In FY 1989, the Wage and Hour Division published regulations lifting the ban on the employment of homeworkers in certain restricted industries subject to a certification process; regulations on the employment of individuals with disabilities at special minimum wages; and regulations implementing the Employee Polygraph Protection Act of 1988. Final regulations were also published under the Davis-Bacon and Related Acts on the use of semi-skilled helpers. However, the helper rules will not become effective until after an injunction is lifted by the court.

Industrial Homework

Section 11(d) of the Fair Labor Standards Act (FLSA) authorizes the Secretary of Labor to regulate, restrict, or prohibit industrial homework as necessary to prevent evasion of the minimum wage requirements of the Act. In the 1940s, the Department banned homework in seven industries (women's apparel, jewelry manufacturing, gloves and mittens, button and buckle manufacturing, handkerchiefs, embroideries, and knitted outerwear). Exceptions to the ban have been permitted for individuals in certain hardship cases. Homework has never been prohibited under the FLSA in any other industry.

On November 10, 1988, final rules were published in the *Federal Register* which lifted the restrictions on the employment

of homeworkers in most of these industries. The ban was retained only in the women's apparel industry (for further study) and in jewelry manufacturing operations involving safety and health hazards. The International Ladies' Garment Workers' Union and others filed suit in January 1989 to enjoin implementation of these rules.

Under the new regulations, the Wage and Hour Division received 60 applications from employers for authority to employ homeworkers. Of these, 41 were in the knitted outerwear industry, 5 in embroidery, 8 in gloves and mittens, 5 in jewelry, and 1 in buttons and buckles. A total of 46 certificates have been issued and 3 denied. The remainder are being reviewed.

In December 1988, an advance notice of proposed rulemaking was published which indicated that the Department was considering lifting the ban on homework in the women's apparel industry. Public hearings were held in seven cities for the purpose of gathering information about the characteristics of the women's apparel industry and the kinds of enforcement mechanisms that might be appropriate to include in any new regulation for this industry.

Prevailing Wage Laws

Government contract enforcement concentrated on complaints alleging violations of the various laws that provide labor standards for employees performing government contract work. During FY 1989, 4,903 investigations were conducted under the Davis-Bacon and Related Acts, the Service Contract Act, and the Walsh-Healey Public Contracts Act. Back wages were found due 59,587 workers under the provisions of these laws and totaled \$44.1 million. Employers agreed to pay \$35.1 million of these back wage amounts to 51,870 workers. Additional monies are to be restored upon completion of administrative hearings or litigation action.

Under the Davis-Bacon and Related Acts, 12,556 prevailing wage determinations were issued during the fiscal year; 11,877 were issued for specific construction projects and 679 were general wage determinations which apply to many construction contracts in a given area. There were also

approximately 1,100 modifications of the general wage determinations during the fiscal year.

Improvements continued in Davis-Bacon wage survey operations through increased use of automation for survey management and data computation procedures. Internal management procedures for conducting surveys were completed and issued to staff.

The Wage and Hour Division issued 5,162 new or revised determinations of prevailing wages and fringe benefits under the Service Contract Act (SCA) for a variety of job classifications. Wage determinations were issued for approximately 50,200 requests. Additionally, continued expansion of the Blanket Wage Determination Pilot Test, including training of civilian agency procurement trainers resulted in 130 areas established for Blanket Wage Determinations in effect during the fiscal year.

The Service Contract Manual of Operations was published and made available to interested parties through the Government Printing Office.

Minimum Wage and Overtime Standards

Timely response to complaints continued to be the cornerstone of the Wage and Hour Division's enforcement strategy during FY 1989. The Division conducted 74,197 compliance actions under the FLSA, of which 58,449 were initiated as a result of complaints from workers or concerned citizens. The percentage of actions completed that were the result of complaints (78.8 percent) increased by 2 percent over the previous fiscal year.

In spite of the Division's efforts, the inventory of complaints increased from 20,377 to 21,246. The increase was anticipated prior to the beginning of the fiscal year. The Wage and Hour Division had projected an increase from 20,377 to 20,909 due to additional enforcement responsibilities related to the Employee Polygraph Protection Act and the Immigration Reform and Control Act requirements for Special and Replenishment Agricultural Workers (SAW/RAW).

The FLSA enforcement program disclosed \$29 million due 151,000 workers as a result of minimum wage violations,

and \$131 million due 338,000 employees as a result of overtime violations. Employers agreed to pay \$21 million in unpaid minimum wages to 124,000 workers and \$101 million to 287,000 employees due overtime pay for a total of \$122 million.

The difference between the amount of back wages found due employees and the amount that employers agreed to pay reflects, for the most part, sums involved in pending litigation or the failure of certain employers to pay back wages in cases the Department deemed unsuitable for litigation. The FLSA also permits individuals to bring private suits to collect back wages, liquidate damages, attorney's fees, and court costs. The Department's enforcement statistics do not include the back wage amounts recovered in such private suits.

Child Labor Standards

The Wage and Hour Division found 22,508 minors employed in violation of the child labor provisions of the FLSA during fiscal 1989. The Division assessed nearly \$2.77 million in child labor civil money penalties (more than triple the FY 1983 amount) against 894 employers who were found to be illegally employing 16,790 minors.

Special Minimum Wages

During FY 1989, the Division issued 17,751 certificates under section 14 of the FLSA, authorizing the employment of approximately 299,109 workers at less than the minimum wage. Full-time students and workers with disabilities employed in rehabilitation facilities accounted, respectively, for 30 percent and 66 percent of the workers employed under certificates.

On October 16, 1986, the President signed legislation which amended section 14(c) of the FLSA, pertaining to the Secretary's authority to issue certificates allowing employers to pay subminimum wages to disabled workers. These amendments had the effect of streamlining the certification process and eliminating guaranteed wage rates specified by certificates, and requiring only commensurate wages. In addition, the amendments established a petition procedure for review of a disabled worker's wage rate by an administrative law judge. On

July 20, 1988, the Department published a notice of proposed rulemaking, Regulations, 29 CFR Part 525, in the *Federal Register* implementing the 1986 amendments to section 14(c) of FLSA. This notice provided for a 60-day public comment period which was subsequently reopened and extended for 15 days. The Department completed its review of the public comments and published a final rule on August 10, 1989, effective September 11, 1989.

During the fiscal year, the first petition for a review of wages by an administrative law judge was filed by workers at the Southwest Lighthouse for the Blind, Lubbock, TX. There were several postponements which were agreed to by representatives of the workers and the facility in an attempt to reach an agreement with respect to back wages and future compliance. No agreement was reached before the end of the fiscal year.

Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

During fiscal year 1989, there were 12,695 farm labor contractor and farm labor contractor employee registrants under MSPA who employed approximately 427,615 crew members.

The Wage and Hour Division conducted 4,809 MSPA compliance actions during FY 1989, which resulted in civil money penalties totaling \$1,219,655 assessed against violators. In the fiscal year, 105 actions were initiated to deny farm labor contractors and farm labor contractor employees certificates of registration.

MSPA and its implementing Regulations, 29 CFR Part 500, were amended to provide for the deletion of the provisions prohibiting illegal alien employment. Sanctions are imposed by the Immigration and Naturalization Service (INS) pursuant to the Immigration Reform and Control Act amendments of 1986 (IRCA).

The Immigration Reform and Control Act of 1986 (IRCA) Employment Eligibility Verification

The Immigration and Nationality Act (INA), as amended by IRCA, requires employers to hire only legally authorized

workers, to verify new employees as being legally authorized to work, and to retain records of this verification process. ESA's Wage-Hour compliance officers are responsible for inspecting employment eligibility verification documents (INS Form I-9) during the course of regularly scheduled on-site compliance activities. During FY 1989, there were 40,755 establishments in which I-9 Forms were inspected nationwide. All inspection findings are reported by ESA to INS for that agency's determination as to compliance or noncompliance.

Temporary Alien Agricultural Workers (H-2A)(Regulations 29 CFR, Part 501)

The administration of the H-2A program is primarily the responsibility of the United States Employment Services (USES) in the Employment and Training Administration (ETA). The Wage and Hour Division has been delegated responsibility for the enforcement of the contractual obligations of an employer of H-2A workers to such workers and other workers engaged in corresponding employment. Wage and Hour completed 574 compliance actions since enforcement functions began in 1987.

Reporting and Employment Requirements for Employers of Certain Workers Employed in Seasonal Agricultural Services, Regulations 29 CFR, Part 502

Employers of certain resident alien workers employed in seasonal agricultural services are required to record and report information regarding their employment. The data reported allows for determinations to be made by the Secretaries of Labor and Agriculture as to whether additional alien workers may be admitted with legal status each year beginning in FY 1990 (through FY 1993) as replenishment agricultural workers (RAWs). A certificate from the employer showing the number of work-days such worker was employed in seasonal agricultural services may be used by the worker to qualify for permanent residency status. The employer requirements are prescribed by Regulations 29 CFR, Parts 502 and 503 issued pursuant to the INA as amended by IRCA.

There were 803 investigations of employers of special agricultural workers in FY 1989, which revealed compliance or agreement to comply with the law in nearly all cases.

The Employee Polygraph Protection Act of 1988

The Employee Polygraph Protection Act, which was enacted June 27, 1988, prohibits most private employers from using lie detector tests either for pre-employment screening or during the course of employment. (Federal, State and local government employers are exempted from the Act.) The law provides several limited exemptions which permit the use of polygraph tests (but no other type of lie detector tests) under certain conditions.

The Wage and Hour Division has the responsibility of enforcing this law. During FY 1989, Wage and Hour conducted 51 investigations under this program. The cases involved the prohibited use of polygraph/lie detector tests. Nearly all cases resulted in agreement to comply.

Office of Federal Contract Compliance Programs

The Office of Federal Contract Compliance Programs (OFCCP) continued to foster affirmative action and the elimination of discrimination from the workplace of Federal contractors, and to obtain redress for victims of discrimination.

During FY 1989, OFCCP completed 6,232 compliance reviews. The reviewed contractors employed a total of 2,941,636 employees. In addition, OFCCP continued to give priority to reducing the number of aged compliance reviews over one year old. At the end of FY 1989, there were 46 such reviews. Complaint cases in inventory at the end of the fiscal year declined from 3,208 in FY 1988 to a current inventory level of 599 in FY 1989. OFCCP conducted 1,321 investigations of discrimination complaints.

Where contractor noncompliance was found, OFCCP entered into 2,568 conciliation agreements and 1,998 letters of commitment. OFCCP also recommended 115 enforcement actions which could result in removal of contractors from

eligibility to compete for Federal contracts. Additionally, the Solicitor of Labor filed formal administrative complaints against 41 Federal contractors. No contractors were debarred during FY 1989.

In FY 1989, OFCCP negotiated a total of 603 agreements in which contractors committed \$36,798,697 in financial outlays for lump sum or other cash payments, front pay, back pay, salary adjustments, accommodations, recruitment and training costs. Of this total, \$21,663,543 in back pay awards went to 6,634 women, minorities, persons with handicaps, and veterans.

Since 1982, OFCCP has taken positive steps toward effecting voluntary affirmative action among the contractor community. As a result, in FY 1989, 12,588 contractors were provided with 57,623 hours of voluntary technical assistance to better enable them to comply with OFCCP regulations.

In addition, during this reporting period, 15 new liaison groups were formed. These groups continue to explore general compliance problems and solutions in a cooperative setting. They contribute valuable input to OFCCP on ways to improve the compliance process and address aspects of affirmative action unique to their employment situations or industries. OFCCP, in turn, provides advice, specific technical assistance and an exchange of information. In 2,536 instances, OFCCP arranged "linkage" agreements between employers and agencies providing worker training or referral services.

In November 1987, a task force was established to recommend means of improving coordination between the agencies. One of its recommendations was that joint consultation procedures would be of great benefit to the agencies in improving their compliance and enforcement activities, including conciliation agreements and litigation.

During FY 1989, the Office of the Solicitor and OFCCP implemented Joint Review Committees (JRCs). Each Regional Solicitor and Regional Director set up a JRC for their respective regions. The JRC meets at least once each quarter to discuss matters of mutual concern, i.e.:

- (a) To identify and agree upon any specific measures that would

lead toward greater efficiency and effectiveness in the enforcement process;

(b) To review OFCCP's compliance review/complaint investigation plans and activities, including anticipated enforcement actions and issues;

(c) To arrive at initial enforcement strategy and, subsequently, to make any needed adjustments to that strategy; and

(d) To exchange information regarding matters pending in their respective offices. These Joint Review Committee meetings may also include the setting of national priorities.

During FY 1989, a number of initiatives were developed to increase program outputs and improve quality and program effectiveness. Initiatives which were put into effect included:

■ The new Standard Compliance Review Report (SCRR) Form: The new format has been streamlined to improve the enforcement process by eliminating unnecessary and burdensome procedural steps. The new SCRR format leads the Equal Opportunity Specialist through the compliance process, step by step, while keeping the review focused on the problem areas. OFCCP plans to further develop the new SCRR by computerizing the form;

■ During FY 1989, major chapters of the Contract Compliance Manual were revised, then issued and implemented. The revised chapters incorporate the new SCRR procedures as well as all current and revised policy directives to provide better guidance to compliance staff;

■ OFCCP continues to encourage Government contractors to address the need to increase availability of minorities, and women through training in order to meet employment needs of new technologies as we approach the year 2000;

■ OFCCP continued encouragement of contractors' voluntary directed efforts toward affirmative action through increased high quality technical assistance, recognizing those

contractors whose compliance efforts are meritorious and the formulation of liaison groups with OFCCP;

- Refined and improved management information systems designed to improve the quality and timeliness of data used in evaluating contractor performance, as well as OFCCP's own operational performance;

- Developed and implemented guidance on proving and remedying systemic discrimination;

- Implemented the Time Reporting Information System (TRIS) as part of OFCCP's management information system;

- Continued development of a revised and comprehensive training program to address the needs of professional field staff for programmatic training. The training will result in increased quality and efficiency in the compliance review process and the investigation of complaints, and computer literacy. Training will also help in our implementation of uniform and consistent application of policies as well as enable our managers to give clear direction and purpose to the program;

- In conjunction with case management, improved attention is focused on case quality assurance, i.e., comprehensive and thorough investigative content and consistent application of regulations and procedures;

- Delivered the New EOS Training/Orientation, one of a series of courses known as the OFCCP Academy. Training on the new SCRR was also provided. The second session of the first-line supervisors training was to be delivered in November. Development of interviewing and investigative techniques were to be delivered shortly thereafter;

- Assessed the affirmative action and discrimination in emerging technologies. OFCCP will discuss the future of affirmative action with various EEO organizations, Federal contractors and community groups in terms of equal employment opportunities through the year 2000;

- Provided policy and guidance on corporate level selection decisions. Initiatives in development include:

- Revisions of the remaining chapters of Federal Contract Compliance Manual incorporating current and revised

policy directives to provide better guidance to compliance staff;

- Pilot test corporate initiatives to develop procedures to ensure opportunities for protected groups to reach the highest levels of the corporate structure;

- Develop and publish a comprehensive annual report for the public summarizing OFCCP's most significant accomplishments;

- Develop and implement a revised Quality Audit Assurance Form to reflect the revised compliance manual and the new SCRR to ensure consistent application of established policies and procedures throughout the program;

- Continue development of training courses as a part of the Training Academy to address the needs of professional field staff;

- Focus compliance reviews, targeting issues such as training and development; pay and performance; career tracks and affirmative action to attract persons with disabilities.

Office of Workers' Compensation Programs

The Office of Workers' Compensation Programs (OWCP) paid wage loss and medical benefits totalling over \$2 billion dollars to approximately 400,000 injured workers in its Federal Employees Compensation, Black Lung, and Longshore and Harbor Workers' programs in FY 1989. OWCP's timely service to workers was maintained and improved, with 94 percent of FECA traumatic claims adjudicated within 45 days and 95 percent of medical bills paid within 60 days; 96 percent of Black Lung initial findings issued within 180 days; and 99 percent of lost time reports processed in 14 days in Longshore. A record 1,718 injured FECA and Longshore workers were returned to work through rehabilitation, reflecting such new initiatives as the use of nurses to visit injured employees, wider provision of services, and activity by claims examiners.

In the Federal Employees' Compensation program, despite a three percent higher incoming workload, the inventory of undecided cases was maintained at only 12,000, with only 68 cases, chiefly the more complex occupational illness cases, remaining unadjudicated more than one year. In addition, work

was restructured to place important case development actions and management of cases after adjudication in the hands of experienced senior claims examiners, upgrading the career path to the GS-12 level, and introducing conferencing to better resolve disputed issues. OWCP completed necessary preparations to convert 42 mail room positions in the three programs from government to contract staff, carrying out an Office of Management and Budget initiative. Improved equipment, guidance and training were introduced to bring about improved communication between FECA adjudicators and the injured employees, supervisors, and attorneys. Automated data processing equipment was delivered to field sites, bringing FECA close to full conversion to a modern new system. Meanwhile, equipment and converted software were readied which will integrate the Longshore offices into the FECA system as well.

In Black Lung, a new contract to process medical bills and provide automated data processing support was signed. Finally, \$92 million of outstanding debt was resolved in FECA and Black Lung, with collections of over \$57 million returned to the Treasury through aggressive management of accounts receivable.

Office of State Liaison and Legislative Analysis

The Division of Legislative Analysis (DLA) of the Office of State Liaison and Legislative Analysis (OSLLA) is the principal staff support unit in ESA concerned with Federal legislative activity. During FY 1989 the Division examined nearly 300 Congressional bills to assess their impact on ESA-administered programs. The Division also coordinated the preparation of ESA entries into the Regulatory Programs of the U.S. Government and the Semi-Annual Unified Agenda of Federal Regulations. DLA also developed materials for a Departmental Task Force on child care liability issues. During the year, DLA closely monitored bills which have expanded ESA's program responsibilities or modified statutes currently enforced by ESA.

OSLLA's Division of State Employment Standards Programs (DSEP) furnished expertise on State labor standards

laws and programs that interact with ESA programs or which relate to emerging issues. The extent of legislative activity to increase State minimum wages, often to levels above the Federal rate required continuous monitoring and updating. This information was frequently requested for use within the Department and was regularly disseminated for the consideration of State legislatures and labor departments in their decision making.

The Division developed and provided extensive information on other State employment standards including child labor, industrial homework, family and medical leave, child care, and drug testing for use in conjunction with the consideration of proposed Federal legislation or rulemaking, or for the use of Departmental task forces or others within the Department. DSEP provided technical advisory assistance and information on numerous labor standards subjects in response to nearly 2,000 requests from State labor departments and legislatures, management organizations, multi-State employers, organized labor, other Federal agencies, the Congress and others.

Throughout the fiscal year, the Division maintained active working relationships with State labor officials and their organizations, and participated in several regional and national conferences of State officials. In serving as a national clearinghouse of information on State legislative developments, the Division reviewed and analyzed approximately 1,300 labor bills and new laws and prepared for publication an annual article on State trends in these areas for the Bureau of Labor Statistics' *Monthly Labor Review*.

The Division also continued to serve as catalyst and facilitator in the promotion and consideration of proposed ESA/State cooperative efforts and agreements involving the administration of programs which are similar at Federal and State levels.

The Division of State Workers' Compensation Programs (DSWCP) served as a provider of technical assistance to State legislative study commissions, State workers' compensation agencies, labor and management organizations, and others

interested in workers' compensation. Some of the issues dealt with included streamlining case-hearing procedures, medical cost-containment initiatives, safety incentive, and review of benefit levels. In its role as a national clearinghouse for State workers' compensation information, the Division produced and distributed its publication *State Workers' Compensation Laws* and *State Workers' Compensation Administration Profiles*.

The Division produced an annual article on significant legislation enacted for the State workers' compensation administrators annual convention and one for the *Monthly Labor Review*. The Division also produced 25 additional information articles and tables in response to requests for assistance. In keeping current on Significant State Workers' compensation changes, the Division analyzed and prepared summaries of 233 new laws and more than 1,300 proposed bills.

Mine Safety and Health Administration

During FY 1989, the Mine Safety and Health Administration (MSHA) initiated or continued special emphasis programs in cooperation with the mining industry and labor to enhance the safety and health of miners. In addition, several important measures were advanced to tighten the agency's administrative procedures for enforcing the federal Mine Safety and Health Act of 1977.

In FY 1989, illegal or "wildcat" coal mining operations--those operations that have not registered with the government so they can be inspected by MSHA--were the target of a special agency task force with favorable results, including convictions of some violators. In the past, investigators have found lax safety practices at such mines. Plans were made to continue these efforts in coal areas in FY 1990.

As part of an ongoing special emphasis program to reduce serious accidents caused by mine roof falls in underground coal mines, MSHA completed production of a series of videotapes featuring top country music performers interspersed with safety messages. By the end of the fiscal year, copies of the training tapes had been played more than 150,000 times in miners' changing rooms at underground coal mines.

During the fiscal year, the agency devoted special attention to the problem of reducing potentially harmful coal mine dust concentrations in underground coal mines. Exposure to excessive respirable coal dust can lead to lung disease. Preliminary findings indicate that this focus was helping to reduce dust levels at selected mines.

A special mine ventilation study by MSHA specialists in FY 1989 pointed the way toward improving fire protection for underground coal miners.

Two of MSHA's longest standing and most successful special emphasis programs were carried out strongly in FY 1989. They are the Program in Accident Reduction (PAR) and

the Compliance Assistance Visit (CAV) program. The PAR program targeted 31 mines needing special aid to improve training and safety efforts, and compliance assistance visits were made by inspectors to many mines at operators' requests to help them comply with regulations.

Elsewhere, the restructuring of MSHA's programs to make enforcement and cooperative miner protection programs more effective continued to move forward during FY 1989, as did the agency's efforts to ensure accountability of MSHA managers and employees for their actions. MSHA increased its investigations of possible criminal violations of the federal mine safety and health statute in the coal industry nearly threefold, from 33 investigations in FY 1988 to 95 in FY 1989. Also, as a result of innovative methods developed to collect delinquent civil penalties for violation of the mine act and MSHA's standards, a record high of \$13.4 million in penalty amounts owed was collected in FY 1989.

The agency also continued its strong effort to audit the accident and injury reporting practices of coal and metal and nonmetal mine operators to obtain a more accurate picture of mine accident records and help MSHA analyze injury trends. A significant number of the nation's mining operations have been audited during the past two fiscal years.

In FY 1989, the number of coal mining deaths rose to 69, the third lowest coal mining toll in history, from 55 deaths the previous year, the all-time record low for coal mine fatalities. Ten of the total of 69 fatalities were the result of an explosion on Sept. 13, 1989, at the Pyro Mining Co.'s underground coal mine at Wheatcroft, KY. Following the ignition, a number of MSHA safety specialists left the National Coal Mine Rescue and First Aid Contest, a competitive emergency training exercise being held in Louisville, KY, to assist at the explosion site.

At the end of the fiscal year, MSHA was completing the underground phase of its investigation into causes and circumstances of the accident and was scheduling witness interviews. A final report is expected in FY 1990.

In metal and nonmetal mining in FY 1989, there were 50

fatalities, compared to the 49 miner deaths in 1988 that represented an all-time low annual figure.

The trend of deaths and injury rates has been downward over the past decade in both coal and metal and nonmetal mining.

Also during FY 1989, MSHA laid the groundwork for production of a training videotape for the mining industry discussing the uses of employee assistance programs (EAPs) for mine employees who have alcohol or drug abuse problems. A survey of mining industry attitudes and practices in dealing with substance abuse issues was conducted during the fiscal year as part of a five-year effort by an MSHA-industry-labor committee formed to address problems of substance abuse in mining. Production and distribution of the EAP training videotape was planned for FY 1990. Previously, MSHA issued a videotape designed to create awareness of these problems.

A well-trained workforce is of paramount importance to achieving safe work practices in mining and, to this end, the agency stepped up its activities to promote accident prevention and health training for more miners. Nearly \$5 million was granted to the states and to the Navajo Nation to train nearly 135,000 miners. More than 2 million copies of training materials were distributed to the mining community; training at MSHA's National Mine Health and Safety Academy remained at a high level; and more training programs than formerly were offered to remote areas through satellite transmission.

Major regulatory actions taken during the fiscal year include the agency's publication of a proposed new rule to identify and deal with operators of mines having persistent and serious violations of safety and health rules. Also proposed were regulations to revise mine air quality standards. On the FY 1990 regulatory action agenda were, among others, a proposed rule on regulation of diesel-powered equipment in underground coal mines, an underground coal ventilation rule, separate coal and non-coal rules addressing mine electrical hazards, a rule on requirements for accident reporting by mine operators, and a rule for ensuring that miners receive information on chemical hazards.

In the technical area during the year, a joint technical effort of MSHA and the federal Bureau of Mines resulted in development and testing of an emergency, oxygen-generating self-rescue device that is, unlike comparable equipment currently being used, light enough to be comfortably worn by a miner in case of an underground mine fire, explosion, or other serious accident.

Coal Mine Safety and Health

During fiscal year 1989, there were 2,026 underground coal mines and 2,740 surface coal mines and facilities under jurisdiction of MSHA's Coal Mine Safety and Health Division.

The Division conducted 60,266 safety and health inspections and investigations, including 7,906 education and training activities at mine sites. It also issued 109,723 citations and orders to coal mine operators and independent contractors working at the mines. Citations are issued by mine inspectors for violations of health or safety rules. MSHA supervisors held 1,509 health and safety conferences to discuss inspectors' findings. Such conferences are held at the request of mine operators and miners' representatives.

The Coal Division's work force consisted of 1,529 employees in FY 1989. The mine inspection work force numbered 789. Coal mining division managers, inspectors, technical specialists, and education and training specialists operated from 10 district offices, 17 subdistrict offices, and 73 field locations throughout the country.

There were 82 MSHA health and safety training specialists stationed in district and field offices to aid mining companies in their education and training programs. During FY 1989, plans were made to have all of the Coal Division's training personnel take further training to enhance their ability to carry out programs at mines and mills.

Sixty-nine coal miners died in accidents on the job during the 1989 fiscal year, compared to 55 in FY 1988. The year-to-year rise was largely, though not entirely, due to the underground coal mine explosion that killed 10 at Pyro Mining operation in Kentucky in mid-September 1989.

The fatal incidence rate in coal mining in FY 1989 was .05 deaths per 200,000 employee work-hours, up from the rate of .04 fatalities the previous fiscal year. The rate for all types of injuries in coal mining was 10.95 injuries per 200,000 work-hours, up from 10.79 injuries in FY 1988.

The number of coal mining industry employees (excluding office workers) was 156,081 at the end of FY 1989, compared to 170,694 in FY 1988.

During the 1989 fiscal year, a task force comprised of MSHA personnel at all levels set into motion a vigorous new program to combat illegal coal mining operations--those operations not having registered with the government so that they can be inspected under the Mine Safety and Health of 1977. Preliminary results showed that the targeting effort appeared to be having an effect in lower illegal mining activity. Indictments and convictions were secured against four persons for illegal activities, and a public awareness campaign to stop the practice was begun in several coal-producing states.

MSHA investigated 137 complaints of safety or health-related discrimination that coal miners filed with the MSHA during the fiscal year. Ninety two investigations were opened into possible "knowing and willing" violations of coal mine safety and health regulations. Procedures for conducting both types of investigations were improved, and employees involved in this activity given added training.

A project to develop a uniform format for preparing mine inspection reports was completed in FY 1989 and the format adopted by the agency. Special inspection notepads were developed to improve methods of recording and documenting required elements of mandatory coal mine inspections. Also, training in using the new system was instituted for field personnel.

On the ongoing effort to ensure the integrity and control of Coal Mine Safety and Health (CMS&H) programs, district-level reviews of all MSHA coal offices were conducted during the fiscal year to determine compliance with agency directives to have effective management accountability procedures in place. Headquarters personnel also reviewed the practices and

programs of eight of the Coal Division's 10 districts.

Twenty-three new supervisors were graduated from the Coal Division's third annual Supervisory-Managerial Development Program. Each year, follow-up evaluations have resulted in beneficial changes to the training program structure.

In FY 1989, the Coal Mine Safety and Health Division made important contributions, along with other MSHA offices, in developing a proposed "pattern of violations" rule that would target repeated violators of MSHA's rules, a proposed regulation to revise and improve mine air quality requirements, and a rule on emergency braking of certain underground coal mine vehicles, among other actions. The pattern and air quality rules also would apply to non-coal mining.

A special MSHA panel, formed to review safety questions surrounding the ventilation of conveyor belt entries in underground coal mines, produced findings and recommendations pointing the way toward significant improvements in protecting underground miners from fire hazards. The agency indicated that enforcement policies could be revised where the panel's report shows that improvements could be made.

The process under which the mining industry petitions MSHA to have safety rules modified was computerized and decentralized to the district office level in FY 1989. Benefits of the change include more effective retrieval of information and data on pending and completed cases and better access to historical information on this subject.

During the fiscal year, CMS&H continued to give special attention to programs to reduce potentially harmful respirable coal dust levels at selected underground coal mines which had been having problems keeping coal dust concentrations at acceptable levels. As part of this effort, a longwall coal mining dust control handbook was prepared in cooperation with the Interior Department's Bureau of Mines to provide mine operators with the latest information on longwall dust control techniques.

The Coal Division also developed and put into effect a new program for ensuring that MSHA employees who may

travel on mine property have properly fitted emergency respirators and that employees regularly undergo respirator refitting and testing.

Five handbooks covering procedures for conducting activities related to inspections and the investigations of underground and surface coal mines were completed and distributed during FY 1989. The handbooks, used to supplement MSHA's program policy manual, cover coal mining subject areas of health laboratories, impoundments, special investigations, and petitions for modification of health and safety rules. Distribution of handbooks addressing electrical and general inspection and investigation procedures is planned for FY 1990.

Metal and Nonmetal Mine Safety and Health

MSHA's Metal and Nonmetal Mine Safety and Health Division carried out programs to promote miner protection programs at about 400 underground mines and more than 11,000 surface mines, quarries, sand and gravel operations, and mineral mills during the 1989 fiscal year. These operations produce a variety of mineral materials, including gold, silver, zinc, copper, iron, uranium, limestone, potash, and sand and gravel.

As of the end of FY 1989, metal and nonmetal mine inspectors operated from six districts throughout the country, six subdistrict offices, 49 field offices, and six field stations. The sixth field station was established in Juneau, AK, becoming operational in April.

The work force of this activity totaled 530 employees, 357 of whom are mine inspectors and investigators. Six subdistricts were scheduled to be eliminated in FY 1990 as part of a reorganization plan first put into effect in mid-1986. Before the reorganization began, there were 12 subdistrict offices.

There were 50 fatalities at metal and nonmetal operations during FY 1989, compared to 49 during the previous fiscal year, the record low figure.

The fatal incidence rate for FY 1989 was .02 deaths per 200,000 employee work-hours, matching the historical low rate

in FY 1988. The incidence rate for all types of non-coal mining injuries was 7.75, up from a rate of 6.82 for FY 1988.

During the fiscal year, 18,386 complete regular inspections were conducted at metal and nonmetal mines.

Enforcement personnel also conducted 288 inspections or investigations in response to complaints about hazards from miners or their representatives. And 716 miscellaneous inspections were made for methane concentrations at gassy mines, and at hoisting and shaft-sinking operations and electrical installations.

A total of 259 accident investigations were made during the 1989 fiscal year, including investigations of all fatal accidents, compared to 260 accident investigations conducted during fiscal year 1988.

Special emphasis was given to the auditing of mine operators' and MSHA's records to make sure the mine operators comply with requirements that they accurately report accidents, injuries and employment figures to the agency, and keep proper records. A total of 2,485 audits were conducted during the fiscal year, compared to 849 audits made during 1988.

Metal and nonmetal mine inspectors issued 49,457 compliance orders and citations for violations of safety and health rules during FY 1989. This was a 10 percent increase over orders and citations issued in FY 1988. As a result, compliance follow-up inspections to check correction of previously cited violations increased slightly in FY 1989 from the FY 1988 level.

Metal and nonmetal mine inspectors and training specialists carried on 238 activities to evaluate effects of mine site education and training programs.

During the 1989 fiscal year, the number of MSHA investigations of charges of discrimination brought by miners increased from 100 cases filed for investigation in FY 1988 to 123 cases in FY 1989. Special investigations were completed on 71 alleged discrimination cases. Investigations of cases of possible "knowing and willful" violations of safety or health rules by mine operators decreased from 232 in FY 1988 to 177 in FY

1989. There were 122 investigations completed regarding such violations. Two special emphasis programs were continued in the 1989 fiscal year--the Program in Accident Reduction (PAR) and the Compliance Assistance Visit (CAV) program. The PAR program targeted 31 non-coal mines and mills which had the largest numbers of injuries above the national average for similar mines during the previous year. MSHA provided these operations with special aid to help such companies improve their training and safety procedures.

In FY 1989, inspectors made 1,128 compliance assistance visits (CAVs) at mine operators' requests to mines and mills that were opening for the first time, resuming operations, opening new sections or installing new equipment. The CAV program has received wide acceptance in the industry. No citations are issued by the agency during such visits, but notices of any non-compliance with standards and regulations are issued. Follow-up visits are conducted by inspectors to ensure that deficiencies noted earlier have been corrected. Inspectors and specialists also made 3,311 visits to mines and mills during the fiscal year for other types of compliance activities.

A number of technical developments took place during FY 1988 which involved the revision of metal and nonmetal safety and health rules or development of new rules. The Division's technical specialists advised and supported personnel from the Office of Standards, Regulations and Variances and the Office of the Solicitor in these efforts. Revised safety standards that became effective during FY 1989 included surface and underground standards for loading, hauling, and dumping, and for the use of machinery and equipment. A new approach was taken to organize standards within the Federal Code for easier location by users by realigning the standards into hazard or task-related groups within separate subparts.

Developments in the health area in which metal and nonmetal specialists played important roles included publication of a proposed rule on mine air quality, chemical substances, and respiratory protection for miners. Other rulemaking support activities work on developing prospective requirements on the communication of information on hazards to miners and on

noise hazards. These three subjects of rulemaking also would apply to coal mining.

Technical Support

The Mine Safety and Health Administration's (MSHA) Directorate of Technical Support provided engineering and scientific expertise to the mining industry and rendered investigations, laboratory testing and analysis, and other technical assistance to solve complex problems in areas such as mine ventilation, hazard identification, electrical systems, safe use of mine equipment, roof and ground control, and exposure of miners to toxic materials and harmful physical agents.

The Technical Support Approval and Certification Center in Triadelphia, WV, processed 2,546 mining equipment and materials safety and health approvals during the year, and the inventory of pending cases at the end of FY 1989 was 14 percent lower than it had been at the end of FY 1988.

Under the Federal Mine Safety and Health Act of 1977, MSHA must collect employment and accident-injury information from the nation's mine operators and from independent contractors working at mine sites. These data, which are highly useful in alerting the mining community to accident trends, among other uses, are processed by computer in order to assimilate and analyze them within reasonable timeframes.

During FY 1989, nearly 124,000 accident-injury and employment forms were processed. A major program to increase data processing efficiency was begun in January 1989 by Technical Support and is continuing in FY 1990.

Engineers from Technical Support participated in the Agency's investigation of the fatal gas explosion that occurred on September 13, 1989, at the Pyro Mining Co.'s underground coal mine at Wheatcroft, KY. A detailed technical report was to be prepared concerning the magnitude and direction of explosive forces and probable causes and origin of the explosion.

At the request of the Occupational Safety and Health Administration (OSHA), Technical Support engineers investigated circumstances of a methane explosion in the Crosstown Seven North Tunnel in Milwaukee, WI, on

November 10, 1988, that killed three construction workers. MSHA's subsequent technical report on the investigation was sent to OSHA and the Department of Justice.

Technical Support personnel also investigated a fatal accident on May 6, 1989, in which a barge containing benzene exploded injuring three persons, one fatally. The investigation was requested by the U.S. Coast Guard and was conducted jointly with the Federal Bureau of Mines, which received MSHA's investigation report.

MSHA also provided technical aid in the design and construction of seals to isolate a fire that occurred on May 17, 1989, in the Mathies Mine in southwestern Pennsylvania. The isolation seals successfully withstood the pressure of water that was pumped behind them to extinguish the fire.

Technical Support personnel conducted 524 in-mine and field investigations during the fiscal year to evaluate toxic materials, harmful dust, excessive noise, poisonous gases, electrical hazards, explosives and hoisting problems, and a number of other problems which might affect miner safety or health. Most of the correcting investigations resulted in recommendations for miners' hazardous conditions or environments which could lead to miners' health problems.

During the 1989 fiscal year, more than 77,500 respirable coal dust samples submitted by underground coal mine operators were processed by MSHA technicians as part of the agency's program to ensure that mine operators comply with federal dust control standards to greatly reduce the possibility of miners developing Coal Workers' Pneumoconiosis (CWP). Advanced robotic technology has been adopted in a new centralized process of weighing mine air samples to determine concentrations of potentially harmful respirable coal dust. The new process is more accurate and less expensive than previous hand-weighing of samples.

Besides respirable coal dust analysis, 52,400 mine atmospheric samples of various potentially hazardous airborne substances and gases were analyzed at Technical Support laboratories. These included quartz, silica, elemental and other types of analyses. Such analyses provide physical and chemical

analytical enforcement activities, and contribute to solving health and safety problems.

MSHA's technical specialists provide extensive data about ventilation practices in conveyor belt entries of underground coal mines for an MSHA panel study on the subject. Ventilation measurements and observations were made on 17 mine sections over 10 days to collect primary data for use in the panel's report.

The design and efficiency of Automated Temporary Roof Support Systems (ARTS) continued to improve, offering further prospects for reductions in underground coal mine deaths and injuries due to falling roof rock. The work of Technical Support specialists with two manufacturers helped to produce refinements to ATRS systems for roof bolting machines that can be useful in low-coal mining seams.

A joint technical effort by MSHA and the Bureau of Mines gave promise of improved breathing devices that could be used by miners during future emergencies like underground explosions and fires. Following a long period of development and laboratory evaluations, a new-emergency oxygen-generating self-rescue device began undergoing field testing in several underground mines during FY 1989. A major advantage of the new device is that unlike existing models, it is light enough to be worn comfortably by a miner.

The advanced rescue device was approved for final testing by the National Institute for Occupational Safety and Health (NIOSH). A final report on the new rescue device is expected during FY 1990. Close relations among MSHA and the mine safety and health research agencies, particularly the Bureau of Mines, continued in FY 1989. Two field investigations were made by MSHA in conjunction with the Bureau of Mines to evaluate four earmuff hearing protectors for miners who must work in noisy areas. Meetings between the two agencies were held during the fiscal year to review and evaluate research findings and discuss new technical projects.

During the fiscal year, a total of 208 engineering design plans for impoundments to contain mine wastes were reviewed. Also in FY 1989, MSHA's Approval and Certification Center

completed 141 respirator approvals and actions to assure the quality of mine materials and equipment.

The agency's technical staff provided invaluable guidance and assistance to the agency's Office of Standards, Regulations, and Variances in developing final rules for safety approval of certain types of explosives for use in mining and approval of electric mine lamps, and for proposed regulations targeting hazards of diesel-powered equipment in underground coal mines and air quality in all types of mining, among other regulatory actions.

Educational Policy and Development

Principal responsibilities of MSHA's Educational Policy and Development (EPD) office include coordination of Agency policy on mine safety and health training for miners, supervision of MSHA's National Mine Health and Safety Academy at Beckley, WV, administration of MSHA's state grants program, and provision of support for voluntary safety organizations.

In FY 1989, the office evaluated the effectiveness of MSHA's district office personnel in carrying out training activities with the mining community under the Agency's training regulations. The visits to local MSHA offices also enabled EPD to evaluate current policies for implementing miner training rules to respond to questions from training specialists or others, and assess the need for new or revised education and training rules.

During the fiscal year, 46 states took part in MSHA's state grants program which funds state mine safety activities, particularly miner training. A total of \$4,986,000 was granted to states in fiscal year 1989, and 134,324 miners were trained in state programs supported by the program and conducted in schools and other facilities in mining areas.

The MSHA-supported Holmes Safety Association, a nationwide voluntary organization, continued to expand during the 1989 fiscal year. This organization offered management and labor an opportunity to hold safety meetings using safety materials supported by the association. With a membership of more than 430,044 in all 50 states, the association's 5,389

chapters and 52 councils held some 62,398 meetings with combined attendance of 909,579 during the year to promote safer, more healthful mining.

Nearly 1,100 persons and mining operations received safety awards from the Joseph A. Holmes Safety Association., a voluntary organization separate from the Holmes Safety Association. Formed in 1916 and named for the first director of the Bureau of Mines, the Joseph A. Holmes Association encourages safety by presenting awards for heroism and safety achievements.

In FY 1989, the MSHA Academy conducted a variety of courses totaling 48,990 student days for individuals and groups from mining industry, labor, MSHA, other government entities, state organizations, mining schools, and others. Required and optional education and training courses covered many technical, scientific and task-oriented safety and health subjects.

Among other projects, the Academy produced seven instructor guide manuals, a basic computer course, 20 videotape programs, 20 slide/tape programs, and 12 printed publications. The Academy distributed more than two million copies of training materials to the mining community, duplicated nearly 11 million impressions on safety and health technical and training subjects, circulated 947 videotapes and slide/tape programs, duplicated 1,196 videotapes, made 134 computer searches, and responded to 510 requests for graphics assistance from its own staff through use of a communications satellite and other MSHA offices. Academy-produced interactive training programs were transmitted to mining regions, and other programs were received for use in Academy education courses.

Office of Standards, Regulations, and Variances

The MSHA Office of Standards, Regulations, and Variances continued its ongoing regulatory review program during FY 1989. Under the program, mine safety and health standards undergo comprehensive review and, when necessary, revision to clarify and update them consistent with advances in mining technology, to provide alternate methods for industry to comply

with the rules, and to reduce paperwork where possible. A major goal is to improve protection to miners while reducing unnecessary burdens on the mining industry.

During FY 1989, MSHA proposed a new "pattern of violations" rule to identify and deal with operators of mines having persistent and serious violations of safety and health rules. Other rules proposed in FY 1989 include those to revise mine air quality standards and to revise underground coal mine roof control standards. Final rules published during the fiscal year include those addressing explosives and blasting hazards, automatic emergency brakes and warning devices on mine vehicles, and electric mine lamps.

On August 29, 1989, MSHA published the proposed rule to revise existing standards for air quality and chemical substances at coal and metal and nonmetal mines. This proposal which the industry was asked to comment upon contains new and revised permissible exposure limits for hazardous substances at these mines. In addition, the proposed rule contains revised requirements for monitoring exposure of miners to many substances and for respiratory protection programs.

On May 30, 1989, MSHA issued the proposed rule containing criteria for identifying mines with a "pattern of violations" of mandatory safety standards that "significantly and substantially" contribute to safety or health hazards. Public hearings were held on November 1, 1989, and on November 8, 1989.

On November 14, 1988, the agency published an advance notice of proposed rulemaking for an overall review of existing MSHA requirements for mine operators to provide accurate reports of mine accidents, injuries, illnesses, employment, and coal production.

MSHA continued its review of recommendations for approvals of diesel-powered equipment for use in underground coal mines and development of safety and health standards for the use of diesel-powered equipment in underground coal mines. The proposed rule on diesel regulation was to be issued early in FY 1990.

On May 5, 1989, MSHA issued a proposed rule revising the rules of practice regarding petitions by the mining industry to modify mandatory mine safety standards. The proposal adds time frames for consideration of petitions at all stages of review. Public hearings were held on November 1, 1989 and November 8, 1989.

On August 25, 1989, MSHA issued a notice of availability of a report of a special MSHA panel which had reviewed safety questions dealing with ventilation of underground coal mine conveyor belt entries and made recommendations addressing fire protection measures.

On March 24, 1989, MSHA issued a final rule on automatic emergency parking brakes. This rule requires that automatic emergency parking brakes be installed on rubber-tired, self-propelled, electric haulage equipment (except personnel carriers) used in underground coal mines.

On August 31, 1989, MSHA published a proposed rule asking for comments on safety standards for roof, face, and rib support. This proposed rule would add an exception applicable to anthracite coal mines.

On December 5, 1988, MSHA published a proposed rule revising some safety standards for methane in metal and nonmetal mines. On July 20, 1989, MSHA issued a final rule.

On November 10, 1988, MSHA published a proposed rule on the use of explosives at metal and nonmetal mines. On April 6, 11, and 13, MSHA held public hearings on the proposed rule.

MSHA published a final rule for safety standards for explosives and blasting in underground coal mines on November 18, 1988, that were to take effect on January 17, 1989. After further agency analysis and review of public comments, on January 13, 1989, MSHA stayed the effective date of one provision of the final rule concerning blasting more than one face in a working place.

On November 18, 1988, a final rule on requirements for approval of explosives and sheathed explosive units was issued.

MSHA issued three final rules on July 20, 1989, that included safety standards for electric mine lamps other than

standard cap lamps; for automatic warning devices on mobile equipment, and on certification and qualification of persons to perform certain mine jobs.

On October 24, 1988, MSHA issued a stay of the safety standards for berms or guardrails at haulage areas in the final rule for safety standards on haulage loading, hauling, and dumping, and use of machinery and equipment at metal and nonmetal mines. On August 23, 1989, MSHA published a proposed rule for an alternative to the requirement to provide berms or guardrails at metal and nonmetal mines.

Other regulatory topics under review during the fiscal year included underground coal and surface and underground metal and nonmetal electrical safety standards, with proposed rules for both types of mining expected to be issued for industry comment early in FY 1990; metal and nonmetal radiation standards; a standard on communication of information on hazards to miners in all types of mining; safety requirements for underground coal mine ventilation; and safety standards for mine blasting devices that fire multiple shots.

Office of Assessments

During fiscal 1989, the Office of Assessments assessed civil penalties for 156,729 violations of the Federal Mine Safety and Health Act and of mandatory safety and health standards. This represents a one percent increase over fiscal 1988. Total penalties assessed were \$16.4 million, a figure consistent with the previous year. Assessments for all violations continued to be issued in a timely and accurate manner.

Mine operators requested hearings with the Federal Mine Safety and Health Review Commission on 5,810 violations during fiscal 1989, an increase of 0.4 percent over FY 1988 requests.

MSHA continued its aggressive efforts to collect delinquent civil penalties for violations, primarily through addition of knowledgeable MSHA specialists to the collections staff at headquarters and key mining areas and redefining the debt collection process to emphasize both increased personal negotiation and support for litigation, where warranted. This

approach enabled the government to collect one million dollars in delinquent penalties during the 1989 fiscal year. The agency also negotiated installment plans for mine operators unable to pay the full amounts owed. A record high of \$13.4 million in civil penalties was collected in FY 1989.

Pension and Welfare Benefits Administration

In FY 1989, the Pension and Welfare Benefits Administration (PWBA), the agency charged with oversight of the nation's 5.5 million private-sector pension and welfare benefit plans, saw heightened public awareness of employee benefit issues as a result of several key policy, enforcement and regulatory issues governed by the Employee Retirement Income Security Act (ERISA). In addition, the agency began to put into place a regulatory framework for carrying out new authority conferred on the agency under the Federal Employees Retirement System Act (FERSA).

Enforcement

The enforcement program conducted both civil and criminal investigations. Overall, the program recovered approximately \$111,268,000 for employee benefit plans nationwide. Of this amount, \$88,328,000 was achieved through voluntary compliance and \$22,913,000 through litigation.

The program continued to realize good results from its "Enforcement Strategy Implementation Plan" (ESIP), which calls for direction of 50 percent of enforcement resources to specialized investigations of service providers and financial institutions which serve multiple plan clients. A total of 525 cases were initiated against providers of dental plans, banks, major brokerage firms and insurance companies. This resulted in \$49,169,323 in assets being restored and prohibited transactions reversed for pension and welfare plans. For the most part, these cases challenged fee arrangements, stock and other financial transactions and procedures for managing plan funds.

Uncertainty over the responsibilities of investment managers to vote proxies on shares of stock held by plans generated a review of their practices by the enforcement program. Certain practices, including recordkeeping, voting decisions and voting guidelines were found to be inconsistent

with the fiduciary requirements of ERISA. The Department advised investment managers of the problems and warned them that proxy issues would be monitored on an ongoing basis and could be followed by appropriate action if necessary.

In a move to increase the quality, accessibility and timeliness of information about plan finances and activities, PWBA continued work in designing a new system which will allow it to electronically scrutinize data on annual financial reports filed by plans and will be used to target investigations.

Regulatory Environment

PWBA, in conjunction with the Internal Revenue Service and Pension Benefit Guaranty Corporation, published revised Form 5500 annual reports and rules implementing the changes in reporting requirements. The revised forms, to be filed for plan years starting in 1988, were restructured to eliminate unnecessary information items and simplify other categories of required information.

A final regulation adopting procedures for assessing civil penalties gave the agency a substantial enforcement deterrent to would-be violators of ERISA's reporting requirements. Under that rule, the Department may assess plan administrators up to \$1,000 a day for failure or refusal to file complete annual financial information. A separate companion regulation was adopted which established procedures for appeal of contested penalties.

PWBA also adopted final rules clarifying the scope of a statutory exemption allowing plans to make loans to plan participants.

Finally, the agency continued to establish the regulatory framework for carrying out its responsibilities under FERSA. Final interim rules were adopted establishing procedures for the filing and processing of applications for exemptions from the prohibited transaction restrictions of FERSA. Also, a final regulation established procedures for allocating fiduciary responsibilities among fiduciaries of the Thrift Savings Plan, including members of the Federal Retirement Thrift Investment Board. The Department also adopted a final regulation

establishing procedures for assessing civil penalties for violations of FERSA's prohibited transaction rules.

In addition, six class exemptions granted under ERISA were adopted for FERSA purposes which provided relief for certain transactions with plan fiduciaries that would otherwise be prohibited.

Policy Initiatives

As a primary agency for establishing national employee benefit policy, PWBA was at the forefront of several key policy initiatives affecting private pension and welfare plans.

PWBA and the Treasury Department jointly released a policy statement clarifying the responsibilities of persons who make investment decisions for plans involved in corporate tender offers, takeovers and mergers. The statement reiterates the position that investment decisions to tender shares of stock held by employee benefit plans must be evaluated in relation to the facts and circumstances of individual transactions. Plan investment managers are not automatically required to tender shares.

The agency testified before Congressional committees on the impact of corporate takeovers and leveraged buy-outs involving pension assets, program enforcement actions, pension plan terminations in which surplus assets are recaptured by employer plan sponsors and retiree health benefits.

PWBA also developed departmental positions on legislative proposals in key policy areas relating to mandated health benefits.

Research and Evaluation

Research centered on projects having an intrinsic value in the development of policy decisions by PWBA. One research study was concluded during the fiscal year on pension funding under the Omnibus Budget Reconciliation Act (OBRA) of 1987. The study examined the effect of OBRA on the calculation of pension liabilities, the amount of contributions required and the year-to-year variances in required pension contributions.

Other projects ongoing during the fiscal year included

studies examining employer-provided health benefits, workers lacking health insurance coverage and "Trends in Pensions", a statistical abstract and analysis of pension coverage, funding, the role of pensions in labor and capital markets, pension assets reversions and rates of returns earned by small and large plans.

Public Outreach and Assistance

PWBA received approximately 65,000 inquiries from participants, beneficiaries or interested parties concerning their benefits under their employee benefit plans. The program successfully obtained \$8,200,995 --the highest amount ever--in benefits for participants to which they were entitled but unable to obtain on their own.

In addition to monetary recoveries, many participants were assisted in obtaining health benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and the program provided assistance to employers in administering their health plans.

A documentary television program, "The Retirement Rainbow: Will It Be There For You," was produced. Through the use of real-life situations of individual participants, it explained the impact of career choices on retirement benefits and encouraged workers to plan for their retirement. The program was offered to 606 television stations and 4 major networks. An NBC affiliate aired the show and 31 stations reserved the program for future use.

Outreach assistance was provided by PWBA to the plan sponsor, employer and service-provider community through a three-pronged educational campaign to assist in completing the revised annual reporting form. Over one million copies of a booklet and 500 copies of a companion videotape on Form 5500 requirements were produced and distributed to assist in fulfilling the new requirements. Program staff participated in a number of conferences sponsored by industry practitioners to assist preparers in completing the new 5500 Series forms.

Office of Labor-Management Standards

During fiscal year 1989, the Office of Labor-Management Standards (OLMS) continued to emphasize a well-balanced program of enforcement of the civil and criminal provisions of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), Section 1209 of the Postal Reorganization Act (PRA), and the standards of conduct regulations implementing Section 7120 of the Civil Service Reform Act (CSRA) and Section 1017 of the Foreign Service Act (FSA). OLMS also emphasized compliance assistance activities designed to promote greater understanding of, and compliance with, the Acts.

OLMS criminal investigations primarily involve violations of the embezzlement provisions of section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA). During FY 1989, 168 indictments and other criminal actions were returned and 149 convictions and Pre-Trial Diversion Agreements were obtained. Both figures represent the third highest totals achieved in a fiscal year since the passage of the LMRDA. Nearly \$2 million in embezzled union funds were recovered during FY 1989 and \$264,509 in fines were imposed by the courts. In addition, OLMS conducted 372 embezzlement investigations involving all types and sizes of unions throughout the country. At the end of FY 1989, 193 OLMS criminal cases were pending at the Department of Justice and 332 criminal investigations were pending in OLMS field offices.

In the civil enforcement area, OLMS received 157 complaints from union members alleging violations of the union officer election provisions of Title IV of the LMRDA and 20 complaints alleging violations of the trusteeship provisions of Title III. Nine of these involved international or national unions. Civil action was taken in 33 cases while 18 cases were settled by voluntary compliance. In addition, OLMS supervised 50 union officer elections, one of which involved supervising

delegate elections in 466 local unions representing approximately 200,000 members and the subsequent election of international president at the convention.

During FY 1989, OLMS continued another important agency activity: conducting compliance audits of international, national and local labor unions. Such audits are undertaken primarily to ascertain compliance with the criminal and civil provisions of the LMRDA and to provide compliance assistance to union officials. OLMS conducts these audits using streamlined auditing approaches under its International Compliance Audit Program (I-CAP) and Compliance Audit Program (CAP).

I-CAP audits were conducted in 23 international or national labor organizations in FY 1989. This represents the second largest number of I-CAP cases completed in any year during the program's 8-year history. The audits initiated in fiscal year 1989 involved larger international and national labor organizations, both in terms of annual receipts and disbursements, thereby resulting in an overall decline in the number of I-CAP audits completed. The organizations which were audited had combined annual receipts of \$910 million and represent more than 1,339,406 members in 5,687 affiliated bodies. In addition, 880 CAP audits of local unions were conducted in FY 1989 resulting in 135 fallout embezzlement cases and revealing numerous civil violations. Most of the recordkeeping, reporting, and other civil violations discovered as a result of audits were remedied through voluntary compliance by the unions involved. In addition, OLMS continued to place emphasis on obtaining delinquent and deficient financial reports from all international/national unions. This will be continued during FY 1990.

OLMS received and processed over 50,000 reports filed by labor organizations, union officers and employees, employers, labor relations consultants, and surety companies as required by the LMRDA and CSRA. OLMS also opened 155 employer, consultant, and union officer and employee reporting investigations, and closed 168 such cases during FY 1989.

OLMS field offices conducted various types of compliance

assistance activities in order to promote voluntary compliance with the LMRDA and to complement OLMS civil and criminal enforcement programs. This included seminars on the provisions of the LMRDA for a particular union affiliation or all unions within a geographical area. Participants included union members and union officers at the international, intermediate, and local levels. Contacts with top level international and national union officials were continued to increase dialogue, provide assistance, improve compliance, and promote increased awareness of statutory obligations.

During FY 1989, OLMS translated three publications into Spanish to promote greater understanding by the increasing number of Spanish-speaking union members of their rights under the Acts and the enforcement responsibilities of OLMS. The translated publications are "All About OLMS," "Union Investigations Under the LMRDA," and "Reports Required Under the LMRDA." These publications will be available in early FY 1990.

To promote greater operational efficiency and highlight agency priorities, OLMS reorganized its national and field office structure in FY 1989. As part of the National Office reorganization, a number of reporting relationships were realigned and a new unit, the Division of Liaison, Compliance Assistance, and Training, was created. This new Division is responsible for initiating various programs to improve relationships between OLMS and international/national unions and to secure their assistance in obtaining voluntary compliance. In the field, three area offices were redesignated as district offices and a new district office was opened in Milwaukee, WI. As a result, the current OLMS field structure is composed of 10 area offices, 19 district offices, and five resident offices.

During FY 1989, OLMS continued to place emphasis on training of its investigators, and it will continue to do so in FY 1990. A top priority of OLMS during this reporting period was to ensure that its investigators, auditors and other staff were highly trained in order to respond to the concerns of the union members as well as the public, and to conduct expert investigations to safeguard the rights and funds of America's

union members. This will continue to be a top priority of OLMS in FY 1990.

Bureau of Labor-Management Relations and Cooperative Programs

Continued fast-paced change in labor relations policies and practices in both the U.S. and abroad spurred the Bureau of Labor-Management Relations and Cooperative Programs to create new program services and materials in FY 1989. A new organizational structure, completed just as the fiscal year began, improved the Bureau's ability to develop and deliver these products and services.

New technical assistance programs provided practitioners with specific knowledge and skills necessary to create and maintain joint labor-management efforts in the workplace. To expand its delivery capacity to serve a growing constituency of interested practitioners, the Bureau began to identify and train a nationwide network of service providers.

A public service print-media ad was one highlight of an active publishing year for the Bureau. Research reports, case studies of cooperative programs, and a summary of the Third International Productivity Symposium were offered to the public. The Bureau's newsletter, "Labor Relations Today," now reaches more than 16,000 readers.

Collective bargaining trends, strike activity, and other labor relations issues were addressed in briefing and analysis papers for the new Secretary of Labor. The Bureau provided data on major strikes in the airline, coal, and communications industries through special reports and an expanded weekly summary of significant labor relations activities.

The Canadian-American Demonstration Project, the Bureau's major initiative emphasizing labor-management cooperation to help ease the impact of plant closings and worker dislocations, continued into its fourth year. The Bureau worked closely with other government agencies to train and inform State government and social service personnel

responsible for administering new plant-closing and worker assistance legislation.

The Bureau continued to administer its statutory employee protections responsibilities, including certifying urban mass transit projects and continuing the airline rehire program. Additionally, the Bureau processed appeal cases under the Redwood National Park Expansion Act, which ended in September 1989.

Program Development

The Bureau's fiscal year 1989 reorganization established an office responsible for developing and managing new initiatives tailored to the needs of the Bureau's clientele.

Four new programs designed to provide labor and management with the knowledge and skills necessary for the successful implementation of joint labor-management activities were developed by the new office in FY 1989:

- o Orientation to Joint Labor-Management Initiatives (OJLMI)
- o Partners in Change (PIC)
- o Win/Win Bargaining Training
- o Committee Effectiveness Training

To assure the quality and utility of developing programs, Bureau staff met with many labor-management practitioners and other subject matter experts. In addition, the Bureau produced several briefings to preview the new programs for potential users.

Education Initiative

Nearly 450 attendees at the "Participatory Leadership: School and the Workplace" conference learned about the potential of joint labor-management initiatives for improving operations and student achievement in public education. Secretary of Labor Elizabeth Dole was the principal speaker, and officials from other major organizations such as the AFL-CIO, the National

Alliance of Business, and the Work in America Institute were major presenters and workshop leaders.

The Bureau also continued as an associate member of the Urban District Leadership Consortium representing some 20 large city school systems. The consortium promotes communication about improving public education through teacher-administrator alliances.

School systems in Minneapolis, MN, and Casper, WY, helped pilot test the Bureau's new Partners in Change program. Casper and Albuquerque, NM, school systems held Win-Win bargaining seminars. The Bureau's Orientation to Joint Labor-Management Initiatives is being redesigned specifically for application to the education community.

Public Information

To guide organizations in implementing cooperative programs the Bureau continued publishing and disseminating case studies and special reports. An active outreach program created additional interest in and support for cooperative elements of the union-management relationship. The Bureau's public service advertising campaign pointed to the American worker as the key to the competitiveness of American industry and business. The bimonthly newsletter, "Labor Relations Today," carried the latest on trends in industrial and labor relations practices to an audience grown to more than 15,000 labor-management practitioners worldwide.

Bureau reports on labor-management topics included cooperative endeavors in the airline, steel, and automobile industries, and case studies on labor-management cooperation in developing safety and health committees, forming worker adjustment programs in the face of plant closings, improving public education, and joint training in the communications industry.

Other publications included the final report of a three-year study of the legal impediments to labor-management cooperation and a report of the Third International Productivity Symposium.

Research

The Bureau continued to publish important research findings in the field of labor-management relations. The series of three monographs and three case studies prepared by the Sloan School of Management, MIT, concluded in FY 1989 with case studies on Western Airlines and the Budd Company. A study of cooperative labor-management arrangements in major layoffs and plant closings was issued, as well as Eastern Michigan University's study of cooperation at the General Motors' Hydramatic plant at Willow Run, MI. A study funded last year on State government initiatives to improve labor-management relations will be on the program of the December 1989 annual meeting of the Industrial Relations Research Association (IRRA).

Columbia University's study of human resource policies and practices was published by the Bureau. Wayne State University Press has published the papers and proceedings of the over-subscribed, Bureau-sponsored conference on the older worker in the workplace.

Three Ph.D. grants were issued in FY 1989, continuing the Bureau's grants program initiated the previous year. Awards were made to doctoral candidates at Indiana University, the Graduate School of Commerce and Business Administration at the University of Alabama, and the Kellogg Graduate School of Management at Northwestern University.

During the year, staff participated in a seminar in Jerusalem on industrial relations in the U.S. and Israel; planning is underway for a FY 1990 joint Israeli/U.S. seminar in the United States on decentralization of bargaining.

Employee Protections

During FY 1989, the Bureau certified nearly 800 projects under the Urban Mass Transportation Act, many of which addressed complex new issues in Section 13(c) arrangements. Section 13(c) of the Act, which is administered by the Bureau, provides that the Secretary of Labor must certify that "fair and equitable" arrangements have been made to protect the interests of mass transit employees prior to approval of Federal assistance by the

Department of Transportation (DOT). A substantial number of cases required policy decisions or determinations of protective arrangements by the Secretary. The DOT privatization initiative continued to raise complex issues with respect to Section 13(c), which affects negotiations on employee protection matters.

Federal compensatory benefits decisions were appealed to the Bureau in eight new cases during FY 1989 under the Redwood National Park Expansion Act of 1978. The eligibility period for protections under this program ended with the close of FY 1989. Forty-three pension claims and 464 health and welfare claims were processed during the fiscal year.

The Rehire Program, authorized by the Airline Deregulation Act of 1978, was extended through October 23, 1989. The program provides hiring preference for certain senior airline employees furloughed or terminated during the 10-year period following enactment of deregulation.

Legislative Affairs

The Bureau's three-year project examining U.S. labor law and the future of labor-management cooperation drew to a close in June with the publication of a final report. The report summarized the earlier publications from the "laws project" and noted that the time had come to turn the effort over to interested parties outside the Department to work for improvement. Major portions of the final report were devoted to a review of legal impediments to labor-management cooperation in State and local government, a discussion of aspects of labor law affecting cooperation in the railroad and airline industries, and a selection of materials from the legislative history of the Labor-Management Cooperation Act of 1978.

International Activity

The Bureau continued its close association with the Working Party on Industrial Relations of the Organization for Economic Cooperation and Development (OECD). Deputy Under Secretary John Stepp was elected chairman of the Working Party at its 19th session in February. Bureau staff prepared

discussion papers for that session, as well as various background and position papers relating to program activities of both the OECD and the International Labor Organization.

In December, the Deputy Under Secretary participated in the Joint Seminar on Labor Relations, held in Jerusalem and sponsored by the Department and Israel's Ministry of Labor and Social Affairs as part of a decade-old cooperative agreement. In September, the Deputy Under Secretary met with officials of the Swedish Labor Ministry to develop a program of cooperative activity on work organization. Throughout the year, Bureau officials briefed foreign visitors and U.S. Foreign Service officers on Bureau programs and industrial relations in the U.S. The International Productivity Service, partially funded by the Bureau to collect and disseminate worldwide productivity data, continued working closely with the Japan Productivity Center, the Canadian Labour Market and Productivity Centre, and the European Association of National Productivity Centers. The service is an outgrowth of the International Productivity Symposium cosponsored by the Bureau in 1988.

Industrial Adjustment Service

The Canadian-American Demonstration Project, the Bureau's major effort to reduce worker dislocation, entered its fourth year. This model project, cosponsored by the Bureau and the National Governors' Association, tests the effectiveness of the Canadian Industrial Adjustment System, which provides for advance notice, rapid response, and the formation of labor-management-neutral committees in plant closings or mass layoffs. The General Accounting Office has evaluated the Canadian-American Demonstration Project and will issue a final report early in the next fiscal year.

Last year, Congress passed the Worker Adjustment and Retraining Notification Act (WARN) and the Economic Dislocation and Worker Assistance Act (EDWAA). The Bureau worked closely with the Employment and Training Administration (ETA) to help disseminate information on rapid response techniques and to establish labor-management committees in the 50 States which will have responsibility for

administering the new laws. Presentations were made at ETA regional meetings in Atlanta, Dallas, New York, Seattle, and Washington, DC.

The Bureau also cosponsored State workshops on rapid response and the establishment of labor-management committees in plant closings in Alaska, Arizona, New Mexico, North Dakota, Ohio, Tennessee, Utah, and Virginia.

Field Services

The Division of Field Services inaugurated a new delivery network in FY 1989. The network leverages the resources of more than 200 local organizations and the Federal Mediation and Conciliation Service, enhancing the Bureau's ability to deliver information, training materials, and technical assistance in response to the expanded public demand for Bureau services. The delivery network complements and strengthens local resources by training new trainers in the appropriate use of materials developed by the Bureau and supported through the Bureau's technical assistance program.

Initial training in the Bureau's Orientation to Joint Labor-Management Initiatives (OJLMI) and Partners In Change (PIC) programs was conducted for over 60 local resource organizations in the delivery network, as well as for individual companies and their unions.

Through conferences and seminars, the Bureau expanded the quantity and quality of information on recent innovations available to practitioners. Participants focused increasingly on the need for changing roles of labor and management to improve organizational effectiveness.

In initial pilot tests, practitioners have enthusiastically received the Bureau's two newest training packages. Win-Win Bargaining exposes union-management bargaining teams to state-of-the-art techniques and principles for conducting collective bargaining in a nonadversarial environment. Committee Effectiveness Training equips labor-management practitioners with the task and process skills required to accomplish their joint mission effectively.

Industrial Relations

In addition to continuing its function of briefing the Secretary and key Labor Department officials on significant labor relations developments, the Bureau expanded its weekly report to provide more comprehensive information on new trends and developments in labor relations, including innovative approaches. Through its weekly report and briefing papers, the Bureau reported on negotiations in the communications, transportation, automobile, and coal mining industries. A briefing report for the AFL-CIO's February executive council meeting was prepared.

The Bureau monitored developments in strikes by Eastern Airlines' machinists and pilots, Pittston Group coal miners, and numerous Bell companies' employees that significantly affected the labor relations climate. While the Bell companies, except NYNEX, settled relatively quickly, both the Eastern and Pittston strikes continued as the year ended. The Bureau also analyzed the impact of recent representation elections in the automobile industry.

The State-of-the-Art Symposium, sponsored by the Bureau in March 1989, and its summary report addressed the new roles for labor and management in new, high-commitment organizations. Also being prepared for publication is a complete listing of the ever-expanding labor relations database, which briefly describes the labor relations policies of some 400 companies.

The Bureau continued working with the Collective Bargaining Forum, began to work with the Economic Policy Council panel on employee involvement, and launched initiatives in Total Quality Management and in health care as a collective bargaining issue, anticipating its focus in labor disputes as health care costs soar.

Public Sector

In the public sector, the Bureau continued to focus its efforts at the institutional level, working closely with the Association of Labor Agencies, the State and Local Government Labor-Management Committee, and other organizations. The Bureau

leveraged the significant resources of these organizations to promote labor-management cooperation in government.

In cooperation with the State and Local Government Labor-Management Committee, the Bureau sponsored a video documentary on excellence in government through labor-management cooperation. The video, "Working Together," features exemplary programs in a city, a county, a school district, and a state. More than 150 public television stations across the country aired the program on Labor Day weekend.

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Office of the Assistant Secretary for Veterans' Employment and Training

A highlight of the 1989 fiscal year was the completion of a review of activities funded under Title IV, Part C of the Job Training Partnership Act (JTPA) to assure maximum and efficient use of funds and human resources in serving veterans with the greatest employment and training needs. The JTPA IV-C program was restructured in program year 1989 to increase delivery of skills training for veterans with the highest jobless rates and who experience long periods of unemployment between jobs. A study by the Labor Department's Bureau of Labor Statistics reported that those most likely to need JTPA IV-C services included minority, Vietnam theater, and special disabled veterans. In program year 1989, recipients of JTPA IV-C grants were required to target their services to reach these three veteran groups, who comprise 75 percent of all veterans served by the IV-C program.

Veterans' Employment and Training Service Implementation of PL 100-323

The Veterans' Employment and Training Service (VETS) completed the implementation of policies, regulations, grant provisions, and interagency agreements to carry out the requirements of the Veterans' Employment, Training, and Counseling Amendments of 1988 (Public Law 100-323). These wide-ranging changes impacted on almost all functions of VETS, broadening and defining the responsibilities of VETS offices in overseeing services to veterans provided by State Employment Security Agencies (SESAs) and enhancing those services, providing training to SESA and other staff, and formalizing the exchange of information and training between the Department of Veterans Affairs and the Department of Labor.

VETS is now required to monitor all Labor Department programs for which veterans may be eligible, not only the

veteran-specific programs. VETS has developed a Memorandum of Understanding (MOU) with the Employment and Training Administration, which administers JTPA Title IIA, which serves economically disadvantaged applicants, and JTPA Title III, which serves dislocated workers, to ensure the full participation of veterans in these programs. A memorandum of understanding with the Office of Personnel Management will be signed in 1990.

New Agreement

On July 17, 1989, Secretary Elizabeth Dole and Secretary of Veterans Affairs Edward Derwinski signed a new agreement between their respective Departments. The agreement enlarges the formal exchange of information on veterans' participation in counseling, treatment, training, rehabilitation, and employment programs on a regular basis. Department of Veterans Affairs (VA) personnel receive training at the National Veterans' Training Institute (NVTI), which is funded by VETS, in order to advise veterans about training programs administered by VETS and make appropriate referrals. Disabled Veterans' Outreach Program specialists (DVOPs) and Local Veterans' Employment Representatives (LVERs) also receive training at NVTI on VA programs and services for veterans. This cross-training ensures that veterans will be able to obtain informed, professional assistance on a full range of employment and training-related services from any VA or Employment Service office in the country.

The agreement defines the roles and responsibilities of the Veterans Administration, the Department of Labor, and Employment Service personnel in career guidance and counseling, case management tracking and assistance, and monitoring of the individual veteran's participation in one or more programs to ensure their completion and placement or other followup activity.

JTPA Programs

The JTPA Title IV-C program provides employment and training services to Vietnam-era veterans, veterans with service-

connected disabilities, and those recently separated from the military, i.e., who are enrolled in a JTPA IV-C program within 48 months of separation from active military duty. The JTPA Title IV-C grant program was revised to require a training component and eliminate duplication of services provided by DVOPs and LVERs. Eighty percent of the \$9.517 million appropriation for Title IV-C is allocated directly to the States. For program year 1989, the program required the States to target the hardest-to-serve veterans--special disabled, Vietnam theater, and minority veterans. The remaining 20 percent discretionary funds were used for pilot projects which demonstrate unique and cost-effective forms of training interventions to the JTPA IV-C target groups--special disabled, minority and Vietnam theater veterans.

Homeless Veterans

The requirements of the Homeless Veterans Reintegration Projects (HVRP), funded by the Stewart B. McKinney Act, were revised to emphasize long-term job retention and linkages with supportive services. HVRP projects are now operating in 17 cities, where veterans who have experienced homelessness are hired to train and assist other homeless veterans to obtain supporting services and find jobs.

Veterans' Reemployment Rights

The emphasis in the Veterans Reemployment Rights Program (VRR) in 1989 focused on expediting the resolution of claims. Experience has shown that VRR litigation in the courts is expensive and takes a long time. Quick, informal settlements at the local level are proving to be the most effective way to enforce VRR. An accountability system was developed and new guidelines issued to ensure the timely processing of claims and negotiated out-of-court settlements. A new operational manual was published this year and a VRR training curriculum was developed at NVTI to improve VRR services.

Secretary's Committee

The Secretary's Committee on Veterans' Employment (SCOVE),

established by law under Section 2010 of Chapter 41, Title 38, United States Code, meets at least quarterly for the express purpose of bringing to the the attention of the Secretary, problems and issues relating to veterans' employment.

In 1989, the Secretary's Committee on Veterans Employment issued its report from the previous year's forum. Entitled "Workforce 2000 and America's Veterans," the report reviews the size, composition, and projected changes in the veteran population.

Office of the Solicitor

During fiscal year 1989, the Office of the Solicitor, which is responsible for all legal aspects of the Department's programs, represented the Department in litigation and litigation support functions before the Supreme Court, the Federal courts of appeals, district courts and administrative tribunals. The Solicitor's Office achieved several important victories in the Supreme Court and was successful in obtaining the Court's review of other significant cases. The Department also received favorable decisions in numerous cases before the courts of appeals.

The Solicitor's Office assisted OSHA in the continued expansion of its egregious willful policy from recordkeeping to health areas, including ergonomics, lead exposure, and hazard communication. The OSH Division obtained favorable corporate-wide settlements, including sizable settlements with Sara Lee and Chrysler Corporation. In addition, Civil Rights' litigation in the *Harris Bank* case resulted in a recovery of \$14 million, the largest back pay settlement ever obtained by the Federal Government in a race or sex discrimination case. In total, the national office received 16,474 cases and other matters, while the field offices received 14,977.

The Office provided substantial support to the Department's regulatory programs, particularly in connection with the Fair Labor Standards Act, the Mine Safety and Health Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, the Longshore and Harbor Workers' Compensation Act, the Federal Employees' Compensation Act, the Trade Act of 1974, the Federal State Unemployment Compensation Program, and the Immigration Reform and Control Act.

The Solicitor's Office also assisted Department officials and the Congress on various projects concerning important legislative matters.

Black Lung Benefits

During the past year, the number of black lung cases in the courts of appeals has continued to increase. Approximately 300 appeals were filed, an increase of 50 from last year, and a number of significant decisions were issued by the courts.

We have obtained several important and favorable decisions on procedural issues this year. In *Adkins v. Director, OWCP*, 878 F.2d 151 (4th Cir. 1989), and *Tonelli v. Director, OWCP*, 878 F.2d 1083 (8th Cir. 1989), the Fourth and Eighth Circuits upheld the Office of Workers' Compensation Programs' practice of sending a claimant one letter denying his claim on grounds of abandonment. The courts rejected the black lung claimants' argument that the Department's regulations impose the additional requirement that a follow-up letter be sent at the expiration of the 60-day period given to respond to the original letter. The Fourth Circuit deferred to the Secretary's construction of her regulations, observing that it would make little sense to require the Department to send two denial letters in each case. In a related case, *Jordan v. Benefits Review Board*, 876 F.2d 1455 (11th Cir. 1989), the Eleventh Circuit held that the Office of Workers' Compensation Programs' denial letter provides constitutionally adequate notice to black lung claimants. These cases are of great significance in that they foreclose the possibility that thousands of claims remain pending, and subject to the now-abrogated liberal eligibility criteria, because they were never properly denied.

On the Department's request for rehearing in *Brown v. Director, OWCP*, 864 F.2d 120 (11th Cir. 1989), the Eleventh Circuit withdrew an adverse decision and agreed with the Department that the 60-day time period for appealing decisions of the Benefits Review Board is jurisdictional. Hence, the court held, it may not be extended or waived by the courts of appeals even on equitable grounds. The court observed that the time limitation on appeals from agency decisions imparts finality into the administrative process so that an agency may conserve its resources, and those regulated by the agency may rely on agency decisions in conforming their conduct. Confronted with a strict rule which could yield harsh results against black lung claimants

who are petitioners in the courts of appeals, the court observed that "[j]urisdictional limitations and the policies which they embody must be honored even in the face of apparent injustice or an administrative agency's obvious misapplication or violation of substantive law."

The Department also litigated a number of significant cases involving coal mine operator liability issues. In *Pyro Mining Co. v. Slaton*, 879 F.2d 187 (6th Cir. 1989), the Sixth Circuit held that under incorporated Longshore Act procedures and the black lung regulations, a coal mine operator has a right to a hearing before an administrative law judge where a departmental deputy commissioner enters a default judgment against it for failure to timely contest a preliminary finding of liability for black lung benefits. The court agreed with the Department that the Benefits Review Board erred in holding the operator's remedy is a direct appeal to the Board, rather than a hearing, where the operator alleges inadequate notice of liability as a defense to the default judgment. The court reasoned that the "constitutional right to notice would be illusory indeed if an individual were denied any means to challenge as being inadequate the notice afforded him in particular cases." The case is significant in that it eliminates a Board-created exception to well established black lung program procedures affording litigants the opportunity for a hearing on any question of law or fact.

In *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300 (6th Cir. 1989), the Sixth Circuit agreed with the Department that DOL could correct a mistaken identification of an operator which occurred during the initial processing of a black lung claim as long as the newly named operator is identified prior to a hearing on the claimant's entitlement. It overturned a Benefits Review Board ruling which transferred liability to the debt-ridden Black Lung Disability Trust Fund, and prohibited the naming of the correct operator, where the Department made a mistake in identification during a stage of the case when employment information is often sketchy, and difficult to obtain. The opinion, however, leaves intact adverse Board case law which prohibits the Department from correcting a mistaken

identification which becomes apparent only after a hearing has been held.

Two circuits also interpreted a black lung regulation which provides that the Department may name an operator if the miner-claimant worked for the operator for a period of "not less than one year." In *Director, OWCP v. Gardner*, 882 F.2d 67 (3d Cir. 1989), the Third Circuit upheld the dismissal of Elgin National Industries, an operator by whom Gardner had been employed for 357 days. The court rejected the Department's argument that Elgin, rather than the Black Lung Disability Trust Fund, should be liable for Gardner's benefits because he was employed by Elgin for twelve consecutive months between October 1969 and September 30, 1970. The court observed that although Gardner had been "regularly employed" by Elgin, as also required by the regulation, he was not employed for "one year" as that term is used in the ordinary sense. The court refused to defer to the Department's interpretation because one year is not defined in the regulation, but rather, only in internal documents. Although required by the rules of deference, the court did not hold the Department's position was unreasonable. It also failed to address regulatory language that a finding of one year is not contingent upon a finding of a specific number of days of employment in a given period.

In an unpublished decision in *Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 3578 (6th Cir. May 11, 1989), the Sixth Circuit addressed a different aspect of the regulation in an unfavorable decision. It held that a fourteen-week period during which the miner-claimant was on strike could not be counted in calculating the one year period of employment, even though the employment relationship had not been terminated, and, in fact, continued for more than one year. According to the Sixth Circuit, only those periods during which the employee is actually involved in the extraction or preparation of coal on a covered situs should be included in the one year calculation. Therefore, the court rejected the Department's position that the beginning and ending dates of the employment relationship are determinative, as long as the miner works at least 125 days during that period, as required by the regulation. The court

held that the strike interrupted the period of employment, so that only the periods actually worked before and after the strike should be counted. The court released Cargo Mining from liability even though the miner was employed for a term of more than one year, and actually worked for the company for over 200 days during that time.

The courts also considered a series of coverage questions during the past year. In *Hanna v. Director, OWCP*, 860 F.2d 88 (3d Cir. 1988), the Third Circuit held that a deckhand on sternwheelers and tugs which pushed coal barges on the river between Jones and Laughlin's mines and steel mills is covered as a miner under the Black Lung Act. Although the coal had been processed by the time Hanna came into contact with it, the court was persuaded that because he aided in loading the coal by steadying the barges, he was engaged in covered employment. The court found that "Hanna's participation in the removal of the coal from the tippie was a step, if only the very last step, in the preparation of the coal[.]" which, under the Act, plainly includes loading. In *Kopp v. Director, OWCP*, 877 F.2d 307 (4th Cir. 1989), the Fourth Circuit agreed with the Department that a federal mine inspector is not covered by the Black Lung Act. The apparent basis of the court's reasoning is that federal mine inspectors are covered by the Federal Employees' Compensation Act. In *Amax Coal Company v. Fagg*, 865 F.2d 916 (7th Cir. 1989), the Seventh Circuit, relying extensively on the Department's brief, held that a bulldozer operator who performed reclamation work for a coal company was covered under the Act as a miner because he was involved in work ancillary to the extraction of coal, as required by the Act.

In *Baker v. United States Steel Corp.*, 867 F.2d 1297 (11th Cir. 1989), and *Director, OWCP v. Consolidation Coal Co.*, 884 F.2d 926 (6th Cir. 1989), the Eleventh and Sixth Circuits agreed with the Department that a worker in a coal company's central machine repair shop located within a mile from an extraction site is covered by the Black Lung Act. The courts consequently imposed liability for benefits on the coal mine operators, rather than on the Black Lung Disability Trust Fund, on the basis of

this employment. Both courts reasoned that the machine shop is a covered situs because it was situated "around" a coal mine, as required by the Act. In so holding, the courts rejected the inflexible geographical, or fixed distance rule, and the rule requiring frequent contact with the actual extraction site, to which the Benefits Review Board and one circuit adhere, in favor of the functional approach advocated by the Department. The Sixth Circuit observed that repair facilities are typically located in close proximity to extraction sites because it is economically efficient for the mine operator to be able to repair equipment as quickly as possible, but that mining operations are "inherently peripatetic." The court emphasized that it would be "grossly unfair" to allow an operator to escape liability for occupational illnesses arising from employment in these facilities simply because they are not located directly adjacent to an extraction site.

The courts of appeals have also decided a number of significant entitlement questions during the fiscal year. In the aftermath of the Supreme Court's decision in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988), the Sixth Circuit considered an issue related to the Supreme Court's decision that the Department's interim entitlement criteria impermissibly restrict access to a presumption of total disability due to pneumoconiosis. In *Youghiogeny & Ohio Coal Company v. Milliken*, 866 F.2d 195 (6th Cir. 1989), the court agreed with the Department that, in contrast to the regulatory invocation criteria, the Department's rebuttal criteria were not impermissibly restrictive. The court ruled, on the basis of its prior case law and the Act's directive that all relevant evidence be considered, that all four rebuttal methods outlined in the DOL interim regulation were available to the party opposing entitlement even though the old HEW regulation at issue in *Sebben* provided for only two methods of rebuttal.

Finally, in *Mangus v. Director, OWCP*, 882 F.2d 1527 (10th Cir. 1989), the Tenth Circuit considered that portion of the Department's permanent regulations which addresses the degree of causation a claimant must prove between pneumoconiosis and total disability in order to be entitled to

benefits. It held that under the Part 718 regulations, if pneumoconiosis is at least a contributing cause of a totally disabling respiratory impairment, a claimant has satisfied the burden of proof. The court rejected the Department's interpretation, which requires a black lung claimant to show that pneumoconiosis is a substantially contributing cause of the disability. Although not addressing the specific quantum of evidence necessary to meet the burden of proof, the Sixth Circuit held in *Zimmerman v. Director, OWCP*, 871 F.2d 564 (6th Cir. 1989), that a claimant must show that the total disability is due to pneumoconiosis; the court recognized that mere proof of a totally disabling respiratory impairment, absent a showing that it is due to pneumoconiosis, is insufficient.

The Department continued to participate actively in litigation before the Benefits Review Board during the past fiscal year, filing over 1,300 briefs, motions, or other substantive pleadings and participating in the oral arguments scheduled by the Board. The Board issued several noteworthy decisions during the year.

In *Pendley v. Director, OWCP*, ___ Black Lung Rep. (MB) ___, BRB No. 86-2279 BLA (Ben. Rev. Bd. August 28, 1989), the Board overruled five earlier decisions holding that it possessed jurisdiction to review an administrative law judge's decision denying benefits notwithstanding that the claimant and the liable Trust Fund agree that the decision is erroneous and an award of benefits is appropriate. On the motion of the Director, the Board will now remand such cases to the deputy commissioner for payment of benefits without reviewing the merits of the administrative law judge's decision; the parties' agreement that the claimant is entitled to benefits moots any controversy in the case and, consequently, divests the Board of jurisdiction over the claim.

In *Harris v. NACCO Mining Co.*, 12 Black Lung Rep. (MB) 1-115 (Ben. Rev. Bd. 1989), the Board held that it will apply nationally the Third Circuit's holding in *Trent Coal Inc. v. Day*, 739 F.2d 116 (3d Cir. 1984), that the 30-day period for filing an appeal from an administrative law judge's decision commences on the date the decision is actually filed in the

office of the deputy commissioner. Previously, the Board required appeals in cases arising outside the Third Circuit to be filed within 30 days after the administrative law judge's decision was issued. The Board indicated that fairness and judicial efficiency require a uniform nationwide rule for fixing appeal deadlines.

In *Smith v. Camco Mining Inc.*, ___ Black Lung Rep. (MB) ___, BRB No. 87-723 BLA (Ben. Rev. Bd. July 27, 1989), the Board interpreted section 422(l) of the Act, 30 U.S.C. 932(l), which provides that "no ... eligible survivors of a miner who was determined eligible to receive benefits at the time of his or her death [shall] be required to file a new claim for benefits or otherwise refile or revalidate the claim of such miner...." Under this provision, the survivor of a miner who filed a claim before 1982 is not required to refile and reestablish entitlement after the miner dies. At issue was the necessity for a survivor to file her own claim if the miner's claim was provisionally approved at his death but subsequently denied, precluding an automatic award to the survivor. The Board concluded that section 422(a) relieves any such survivor of the necessity of filing a separate application to pursue benefits in her own right based on the miner's death due to pneumoconiosis; the affected survivor's claim must be adjudicated pursuant to the regulations and statutory presumptions in effect at the time the miner's claim was filed.

Finally, in *Borgeson v. Kaiser Steel Corp.*, 12 Black Lung Rep. 1-160 (MB) (Ben Rev. Bd. 1989), the Board overruled its longstanding holding that rebuttal of the interim presumption of entitlement under 20 CFR 727.203(b)(3) only requires evidence negating a significant relationship between the miner's total disability and his coal mine employment. The Board held that the plain language of section 727.203(b)(3) requires the party opposing entitlement to rule out any causal relationship between the miner's total disability and his coal mine employment. The Board's decision is consistent with the regulatory interpretation adopted by five circuit courts of appeals.

Civil Rights

During fiscal year 1989, the Division of Civil Rights participated in litigation, training activities, regulatory work, and the development of legal opinions involving issues arising under Executive Order 11246, as amended; sections 503 and 504 of the Rehabilitation Act of 1973, as amended; the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 2012 (VEVRA); Title VI of the Civil Rights Act of 1964, as amended; and the nondiscrimination provisions of the Job Training Partnership Act (JTPA), its predecessor, the Comprehensive Employment and Training Act (CETA), and other federal grant statutes.

Enforcement activity on behalf of the Office of Federal Contract Compliance Programs (OFCCP) constituted the major part of the Division's litigation during the fiscal year. The Division filed a number of new enforcement actions with the Office of Administrative Law Judges (OALJ) under Executive Order 11246 and section 503 of the Rehabilitation Act. Additional cases, previously filed, were successfully resolved, while work continued in other litigation. Finally, the year saw an increase in enforcement referrals from OFCCP to the Regional Solicitors' offices. The Division gave considerable attention to coordinating the regional office litigation, training the regional office staff and handling the administrative appeals arising out of the regional trial litigation.

During the fiscal year, the Division filed four Executive Order sex discrimination cases: *OFCCP v. Woodward Governor*, No. 89-OFC-12; *OFCCP v. Kansas City Power & Light (KCP&L)*, No. 89-OFC-28; *OFCCP v. Kaiser Aerotech*, No. 89-OFC-19; and *OFCCP v. Roberts Dairy*, No. 89-OFC-38. In *KCP&L*, a consent decree resolving the discrimination claims was filed along with the complaint. Under the terms of the decree, *KCP&L* provided back pay and seniority relief to six women. *Woodward Governor*, *Kaiser Aerotech*, and *Roberts Dairy* are in pretrial discovery.

The Division filed section 503 complaints in three cases during the fiscal year. In *OFCCP v. ITT/FELEC Services*, No. 89-OFC-26, a consolidated complaint involving two OFCCP

complaint investigations of FELEC was filed alleging denial of access. The case was resolved by consent decree. Two other section 503 complaints were filed this year: *OFCCP v. Siemens Transmission*, No. 89-OFC-11 (class case involving various medical disabilities including back problems, respiratory conditions and epilepsy) and *OFCCP v. ConAgra Poultry*, No. 89-OFC-15 (hysterectomy). *Siemens* was resolved by consent decree providing for \$330,000 in back pay for individuals and retroactive pension contributions. *ConAgra* is in pretrial discovery.

Several other cases, which had been filed in previous years, were resolved by consent decree in FY 1989. In *OFCCP v. Harris Trust & Savings Bank*, No. 78-OFCCP-2, a race and sex discrimination case brought under Executive Order 11246, the decree provided for \$14 million in back pay and other remedies to approximately 9,000 victims of discrimination. The settlement is the largest ever obtained by the government in a race or sex discrimination case. In *OFCCP v. Electronic Data Systems, Inc.*, No. 87-OFC-3, a case brought under Executive Order 11246 involving coverage of interrelated corporate affiliates, the company agreed in the decree to allow OFCCP to conduct compliance reviews of the parent corporation and of subsidiaries that have Federal contracts.

Consent decrees were also obtained in two section 503 cases. In *OFCCP v. GTE, Lenkurt*, No. 87-OFC-15, the consent decree provided for \$18,000 in back pay for the complainant, who was not interested in reinstatement. In *OFCCP v. M-K-T Railroad*, No. 88-OFC-13, a partial consent decree was entered which provided for back pay, reinstatement and retroactive seniority for one complainant. Pretrial discovery is continuing with regard to a second complainant.

The Division also received three favorable final agency decisions during the fiscal year. In *OFCCP v. PPG Industries*, No. 86-OFC-9, the Assistant Secretary for Employment Standards held that PPG had violated section 503 by failing to hire a qualified handicapped individual for an entry level laborer position because of his epilepsy. In *OFCCP v. Washington Metropolitan Area Transit Authority*, No. 86-OFC-8, the Assistant

Secretary held that the complainant, who had high blood pressure, was a qualified handicapped individual, and that WMATA had discriminated against him by failing to hire him because of his blood pressure. In *OFCCP v. University of North Carolina*, No. 84-OFC-20, the Secretary held that the entire university system was covered by Executive Order 11246, section 503 and VEVRA by virtue of Government contracts held by three of UNC's campuses.

Pretrial discovery continued in several significant cases under Executive Order 11246: *OFCCP v. Precision Castparts*, No. 87-OFC-10 (pattern and practice of sex discrimination); *OFCCP v. USAA Federal Savings Bank*, No. 87-OFC-27 (contractor challenge to coverage based upon Federal deposit and share insurance); and *OFCCP v. Piedmont Aviation*, No. 88-OFC-17 (pattern and practice of race discrimination).

During the fiscal year, the Division also filed exceptions and responses to exceptions to ALJ Recommended Decisions in several section 503 cases. In *OFCCP v. Washington Metropolitan Area Transit Authority (WMATA)*, No. 86-OFC-8, the Assistant Secretary for Employment Standards had remanded the case to the ALJ for a hearing to determine the amount of monetary relief owed to the complainant by WMATA due to its discrimination. The Division filed responses to WMATA's exceptions to several of the ALJ's holdings regarding the standards to be utilized in calculating backpay, and the duty of a victim of discrimination to mitigate damages. In *OFCCP v. Yellow Freight*, No. 79-OFCCP-7, the ALJ held that *Yellow Freight* violated section 503 by rejecting applicants solely on the basis of back x-rays, but that only two of the four complainants were entitled to full relief. The Division filed exceptions arguing that the ALJ applied an incorrect legal standard and that he erred in holding that potential workers' compensation liability establishes a business necessity defense. In *OFCCP v. Jacobi-Lewis*, No. 88-OFC-18, a section 503 case, the ALJ recommended an award to the defendant under the Equal Access to Justice Act (EAJA). The Division filed exceptions arguing that EAJA is not applicable to cases under section 503 (except in limited circumstances not applicable to that case).

In *OFCCP v. Cissell Manufacturing Co.*, No. 87-OFC-26, the Division filed exceptions to the ALJ's grant of summary judgment to the company based upon his holding that the complainant's knee impairment did not constitute a handicap for purposes of section 503.

In *OFCCP v. United Parcel Service, Inc.*, No. 87-OFC-17, the ALJ dismissed the case based upon his holding that the complainant, a qualified handicapped individual, was not discriminated against, because she was fired because UPS believed she had committed a dishonest act, and not because of her handicap. The Division filed extensive exceptions to the Recommended Decision and responses to the company's exceptions.

In *OFCCP v. Norfolk & Western Railway Company*, No. 80-OFCCP-14, the ALJ issued a Recommended Decision and Order on Remand holding that the complainant was discharged in violation of section 503 and VEVRA, and ordered the company to provide back wages to the complainant. Although we received a favorable ruling, the Division filed exceptions to the evidentiary standard applied by the ALJ and to his holding that reinstatement, front pay and debarment are either not authorized by section 503 and VEVRA or not warranted by the facts of the case.

In *OFCCP v. Norfolk & Western Railway Company*, No. 88-OFC-4, the ALJ dismissed the case, holding that the company had proven that its job qualifications excluding an obese and hypertensive applicant were job-related and consistent with business necessity and the safe performance of the job. The Division filed exceptions to the ALJ's holdings that the company met its burden of proof and that, had discrimination been found, the complainant would not have been entitled to back pay.

In *OFCCP v. United Airlines, Inc.*, No. 86-OFC-12, the Division filed exceptions to the ALJ's holdings that United had not violated section 503 when it prohibited the complainant, an insulin dependent diabetic, from performing the full duties of a ramp serviceman job; that the complainant was not qualified because of a significant risk of harm due to his condition; and

that United's policy of excluding all insulin dependent diabetics from the full duties of the ramp serviceman job was consistent with business necessity and the safe performance of the job.

The Division also filed exceptions in *OFCCP v.*

Jacksonville Shipyards, Inc., No. 89-OFC-1, a race and sex discrimination pattern and practice case filed under Executive Order 11246. During pretrial discovery, the ALJ ordered OFCCP to produce certain interview statements which had been taken by OFCCP's investigators during the course of the investigation. OFCCP declined to disclose the names of the persons interviewed based upon the Government's informer's privilege. The ALJ dismissed the case as a sanction for the refusal to comply with his order. The Division excepted to his ruling that the names of the informers should be turned over to the company in spite of the privilege and to two other procedural rulings made during the pretrial discovery stage of the litigation.

During the fiscal year, the Division continued to prevail against court challenges to OFCCP's activities. In *Smith & Wesson v. Department of Labor*, No. 85-0427-F (D. Mass. February 21, 1989), the company sought to enjoin a section 503 complaint investigation. The court dismissed the action, holding that the company had failed to exhaust its administrative remedies. In *Kaiser Aerotech v. Local 76 et al.*, No. C89-1331 (N.D. Cal.), the company sought a declaratory judgment to resolve a purported conflict between the requirements of a conciliation agreement between the company and OFCCP and a collective bargaining agreement. The matter was resolved with a voluntary dismissal. In *Gibson v. U.S. Department of Labor*, No. 1:89CV0849 (N.D. Ohio), the court dismissed a challenge to OFCCP's investigatory findings under the Executive Order of no discrimination by plaintiff's former employer, and in *Chasse v. U.S. Department of Labor*, No. H-83-474 (D. Conn.), the court dismissed plaintiff's challenge to OFCCP's closing of her section 503 complaint as untimely on the grounds that there is no judicial review of section 503 nonenforcement decisions.

In *PPG Industries v. United States of America, et al.*, No. 89-0757 (D.D.C.), the Division is assisting the U.S. Attorney in

the defense of the Assistant Secretary's decision in *OFCCP v. PPG Industries*, No. 86-OFC-9. PPG has alleged that the burden of proof applied by the Assistant Secretary was incorrect as a matter of law and that OFCCP's regulation regarding coverage is void because it is beyond the scope of section 503.

In *Dorsey v. United States Department of Labor, et al.*, No. 88-1898 (TFH) (D.D.C.), and *Doe v. Office of Job Corps, et al.*, No. 89-0736-MC (D. Mass.), the Division is assisting the Department of Justice in the defense of the Job Corps' former AIDS screening policy. The plaintiffs in both cases have alleged that the Job Corps' former screening policy, which excluded residential program corpsmembers who tested positive for the AIDS virus, violates section 504 of the Rehabilitation Act, the First, Fourth, Fifth and Ninth Amendments to the Constitution, and the Administrative Procedure Act.

In *Stouffer Foods Corporation v. Dole*, No. 7:89-2149-3 (D.S.C.), the Division is assisting the Department of Justice in defending against the company's broad-based challenge to the Executive Order and section 503. Atlanta RSOL filed an administrative complaint against Stouffer (No. 89-OFC-33) alleging a pattern and practice of race discrimination and several individual violations of section 503. Stouffer has alleged that the Executive Order is unconstitutional and that both the Order and section 503 violate the Contract Disputes Act.

During fiscal year 1989, litigation continued on behalf of the Directorate of Civil Rights (DCR) in *DCR v. Clearfield Job Corps Center (CJCC) and Management Training Corporation*, No. 88-JTP-7. *CJCC* is the first pattern and practice discrimination case brought under JTPA. During the fiscal year a partial consent decree was entered resolving two individual claims of discrimination as well as DCR's allegations that CJCC had discriminated in terminations of minority corpsmembers. The remaining aspects of the case are still in discovery.

In addition to litigation conducted directly by the Division, significant attention was devoted to coordinating litigation in the OFCCP programs conducted by the regions. During the first three quarters of the fiscal year, OFCCP referred 86 cases to the Regional Solicitors' Offices. During the

same period, 21 administrative complaints were filed by the Regions--15 under Executive Order 11246 and six under section 503.

OFCCP v. Cleveland Electric Illuminating, No. 89-OFC-13 (Cleveland RSOL), is a pattern and practice race discrimination case brought under Executive Order 11246. At the end of the fiscal year the case was in pretrial discovery. In *OFCCP v. ASARCO Inc.*, No. 89-OFC-18 (Nashville RSOL), a complaint was filed alleging that ASARCO had violated section 503 by failing to hire five qualified handicapped applicants for employment because of various handicaps. At the end of the fiscal year the case is in pretrial discovery.

During the fiscal year, trials were concluded in *OFCCP v. Lawrence Aviation Industries, Inc.*, No. 87-OFC-11 (New York RSOL), a pattern and practice sex discrimination case under Executive Order 11246; and *OFCCP v. Louisville Gas and Electric Co.*, No. 88-OFC-12 (Nashville RSOL), a section 503 case alleging failure to hire a qualified handicapped individual based upon scoliosis of the spine.

During the fiscal year, the Division also continued its very active opinion and advice support of Departmental activities. Assistance was provided primarily to two agencies, OFCCP and DCR, but also was provided to other organizations throughout the Department such as the Office of the Assistant Secretary for Policy (OASP), the Office of the Assistant Secretary for Administration and Management (OASAM), the United States Employment Service (USES), and the Office of Job Corps.

The Division worked closely with OFCCP on several major initiatives designed to improve the quality of its compliance investigations and the skills and preparedness of its investigatory staff. For instance, the Division provided extensive guidance to OFCCP concerning the agency's revision of its compliance manual, thoroughly reviewing and critiquing the various drafts of each chapter. The manual sets forth OFCCP's policies and procedures for the conduct of compliance reviews and complaint investigations, and serves as the day-to-day guidebook for agency field staff. During the fiscal year, OFCCP

issued five chapters of the revised manual, and work on several more chapters was in progress at the close of the year. The Division also worked closely with OFCCP in the preparation and presentation of a two-week-long training course for new equal opportunity specialists. Division staff fully reviewed the course materials and curriculum. In addition, senior staff from the Division made presentations to the trainees on theories of employment discrimination and on the relationship between OFCCP and SOL in the investigation and enforcement of a case.

The fiscal year saw the culmination of two longstanding projects concerning the nationwide AIDS epidemic. OFCCP issued to its staff a detailed policy directive on the processing of complaints alleging handicap discrimination due to AIDS or related conditions. The directive, which was researched and drafted by Division staff, represented the first guidance provided by OFCCP on the subject. Also, Job Corps issued its revised policy addressing the screening of incoming students for exposure to the AIDS virus and the further processing of students who test positive. Consistent with the Division's advice, Job Corps adopted physical and psychosocial protocols for determining whether seropositive students would be able successfully to participate in the Job Corps residential program.

Another very active area for the Division was participation in the nationwide effort to curtail the use of illegal drugs. The Division worked closely with OASAM to ensure the consistency of DOL's Drug-Free Workplace Plan with rapidly evolving legal standards. In addition, the Division assisted OASP with review of the Administration's National Drug Control Strategy, which was presented to Congress in early September.

The Division also had active involvement in several significant legislative projects. Chief among these was the Americans With Disabilities Act, a potentially landmark civil rights law for individuals with disabilities that is supported by the Administration. The Division advised OASP on the provisions of the bill, reviewed Administration-proposed alternatives, and tracked the progress of the legislation through

the Congress. Additionally, the Division worked closely with ESA in reviewing and critiquing H.R. 2235, a bill that would codify most of Executive Order 11246 and have other direct impacts on OFCCP.

The Division continued its legal support of several ongoing Departmental projects. In May, USES received a comprehensive report from the National Academy of Sciences on fairness in employment testing (particularly relating to the General Aptitude Test Battery, or GATB); an attorney from the Division is working with an ETA task force charged with analyzing the report and proposing options for further Departmental action. Work also proceeded on DCR's comprehensive regulation addressing nondiscrimination in programs and activities funded by DOL. The draft regulation was forwarded to the Justice Department and the Equal Employment Opportunity Commission for review, and a redraft in response to comments received has been prepared.

The Division also continued to provide significant legal opinion and advice support for the day-to-day operations of its client agencies. For instance, it advised OFCCP on the agency's desired termination of National Reporting System agreements with several large contractors, reviewed for legal sufficiency and prepared comments on many new OFCCP policy directives, and prepared legal opinions on a wide range of novel handicap discrimination issues.

Finally, the Division participated intensively in a joint OFCCP-SOL Task Force on Nontraditional Jobs for Women. The Task Force is examining barriers to equal employment opportunity in skilled craft and technical jobs in the aerospace and construction industries. During the fiscal year, Task Force members reviewed closed compliance review files and other materials, and participated in a series of compliance reviews.

Employee Benefits

During fiscal year, 1989 the Division of Employee Benefits provided legal advice and litigation support services to the Office of Workers' Compensation Programs (OWCP) in connection with its administration of the Longshore and Harbor

Workers' Compensation Act and the Federal Employees' Compensation Act (FECA). In addition, the Division was responsible for representing the OWCP in all suits filed against it involving the Longshore Act, the FECA, and the Black Lung Benefits Act, and for processing claims filed with the Department of Labor under the Federal Tort Claims Act.

The Division processed in excess of 9,600 administrative claims involving asbestos-related diseases that were filed with the Department under the Federal Tort Claims Act. During the same period, the Division recovered more than \$1.8 million for the Employees' Compensation Fund as a result of settlements reached in third-party tort actions filed by injured federal workers; these settlements also permitted the Fund to establish a credit against future compensation liability in the amount of more than \$4.9 million. The amounts obtained as refunds and as a credit against future liability more than doubled last year's amounts. Additional significant amounts were recovered through the actions taken by the various regional offices of the Office of the Solicitor, raising the combined total of money recovered plus future credit to over \$11 million.

During fiscal year 1989, the Division provided litigation support to the Department of Justice in connection with numerous suits filed against the United States. These efforts, in part, were responsible for several favorable decisions. Thus, in *Costa v. United States*, No. 89-1403 (Fed. Cir. July 18, 1989), the Federal Circuit held, in declining to hear appellant's claim that he was denied due process in connection with his claim for FECA benefits, that FECA's bar against judicial review set forth at 5 U.S.C. §8128(b), and the court's own jurisdictional statute, deprived it of jurisdiction. The United States Court of Claim also dismissed an action seeking to challenge a decision denying benefits under the 1989). There, the court rejected plaintiff's argument that it had jurisdiction over plaintiff's due process and equal protection claims on three grounds: (1) section 8128(b) of the FECA bars judicial review; (2) even if that section did not bar judicial review of constitutional claims, plaintiff had not asserted a colorable violation; and (3) even if plaintiff had asserted a colorable violation, the Claims Court does not have

jurisdiction over such claims.

Owens v. Brock, 860 F. 2d 1363 (6th Cir. Nov. 10, 1988), involved the question whether the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, applies to proceedings under the FECA. The Sixth Circuit held, on two independent grounds, that the EAJA does not apply to administrative proceedings under the FECA. The court held, first, that proceedings under the FECA are not "adversary adjudications" as that term is defined in the EAJA. Section 504(b)(1)(C) of 5 U.S.C. provides that adversary adjudication "means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise..." Noting that 5 U.S.C. 8124(b)(2) specifically provides that hearings before OWCP hearing representatives are not covered by 5 U.S.C. 554, the court concluded that FECA proceedings are not adversary adjudications within the meaning of 5 U.S.C. 504(b)(1)(C), and therefore the EAJA does not apply to administrative proceedings under the FECA.

The second independent ground relied upon by the Sixth Circuit is perhaps more significant. The EAJA provides at 5 U.S.C. 504(c)(2) that a party dissatisfied with an agency EAJA determination "may petition for leave to appeal to the court of the United States *having jurisdiction to review the merits of the underlying decision* of the agency adversary adjudication." (emphasis added) Since 5 U.S.C. 8128(b) precludes judicial review of decisions of the Secretary of Labor or his designee in allowing or denying a payment under the FECA, no court has jurisdiction to review the merits of the underlying agency decision. The Sixth Circuit therefore concluded that the district court lacked subject matter jurisdiction over Owens' application for EAJA fees because of the interaction of section 8128(b) of the FECA and section 504(c)(2) of the EAJA. The Court of Appeals for the Eighth Circuit, in *Brumley v. U.S. Department of Labor*, No. 88-1587 (8th Cir. Feb. 21, 1989), also concluded that EAJA does not apply to FECA proceedings.

Following issuance of the Supreme Court's decision in *Pittston Coal Group v. Sebben* (1988), which upheld the Department's position that the Court of Appeals improperly

required the Black Lung Benefits Act reopening of thousands of claims that had been finally decided the plaintiff attempted to amend his complaint. The Division prepared and filed a response in opposition to such action; the district court sustained our position. Another civil action involving the Black Lung Benefits Act, *Howell v. Dole*, No. 88-303 (D. Ky.), sought to compel the Secretary to (1) immediately decide all pending petitions for attorney fees filed in Black Lung cases, (2) pay all attorneys at the rate of \$125.00 per hour, and (3) consider the risk of loss to the attorney as a factor in determining the amount of the fee to be awarded. The plaintiff, an attorney, also claimed that the administration of the Black Lung attorney fee system violated the due process rights of claimants. In an order filed July 7, 1989, the court denied plaintiff's motion for class certification on the grounds that plaintiff failed to meet any of the requirements of Rule 23, Federal Rules of Civil Procedure, that Howell's position as both a plaintiff and as counsel in the suit disqualified him as being an adequate representative for the purported class, and that plaintiff lacked standing to assert the constitutional rights of Black Lung claimants.

Litigation before the courts of appeals under the Longshore Act is customarily very active. This year was no exception. Twenty-two opinions, addressing a wide variety of issues, were published. While many opinions confirmed or clarified existing precedents, several broke new ground, resolving issues of first impression.

The Fifth Circuit, sitting en banc, reversed the decision of a unanimous panel in a case involving coverage of shore-side employees under the Outer Continental Shelf Lands Act extension of the Longshore Act. *Mills v. Director, OWCP*, 877 F.2d 356 (1989) (en banc), reversing 846 F.2d 1013 (5th Cir. 1988). By a nine-to-five vote, the majority rejected the Department's position and held that the Longshore Act compensation remedy in the Outer Continental Shelf Lands Act implicitly includes a "situs of injury" requirement and so applies only to workers injured on a platform on the Outer Continental Shelf or on the waters over the Shelf. Thus, workers like Mills,

injured at a fabrication yard on the coast while building a platform for use on the Shelf, are beyond the Act's coverage. The majority's situs-of-injury requirement creates a direct conflict with the Third Circuit's opinion in *Curtis v. Schlumberger Offshore Services, Inc.*, 849 F.2d 805 (1988).

In *Eymard & Sons Shipyard, et al. v. Smith*, 862 F.2d 1220 (1989), the Fifth Circuit issued a favorable decision rejecting the employer's application for second injury fund relief from compensation liability under section 8(f) of the Longshore Act. The court held that where the claimant's lung disease was not "manifest," because it was neither diagnosed by his treating physicians, nor clearly indicated by correlating their reports, the requirements for section 8(f) relief were not established. In a similar case involving section 8(f) relief, the Sixth Circuit interpreted the "manifest" requirement differently, holding that evidence of lung disease on an X-ray taken prior to an employee's second injury, even though no diagnosis was made from that X-ray until after the second injury, was sufficient documentation of the pre-existing condition to meet the "manifest" requirement of section 8(f). *The American Ship Building Co. v. Director, OWCP* (Logan), 865 F.2d 727 (1989).

Questions regarding credit for compensation previously paid for injuries were addressed in three opinions. The principal issue presented in *Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F.2d 759 (5th Cir. 1989), concerned who receives the benefit of the credit for compensation previously paid for a "scheduled" injury when a second injury to the same bodily member increases the employee's disability and the employer is entitled to relief from liability from the Special Fund through section 8(f) of the Longshore Act. The Court agreed with the Director's argument and held that the actual dollars paid for the prior injury must first reduce the total award before there is any allocation of liabilities between the employer and Special Fund. Thus, the Special Fund gets the credit and the employer remains liable for the full amount of compensation payable for the second injury, or for 104 weeks of payments, whichever is less.

In *I.T.O. Corp. v. Director, OWCP*, 883 F.2d 422 (5th Cir.

1989), the Court agreed with the Director's position that no credit against liability for permanent total disability compensation is allowed for permanent partial disability payments made for a prior injury, whether payments are continuing or a settlement was effected; the right to compensation for permanent partial loss of earning capacity and the right to benefits for permanent total disability resulting from a later injury are concurrent, with no effect on one another. The court rejected ITO's argument that it was entitled to a credit under section 3(e) of the Longshore Act noting that section 3(e) applies only where prior compensation was paid under a state workers' compensation provision or the Jones Act. The panel also noted that the "credit doctrine" approved by the en banc Fifth Circuit in *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986) applies only to "scheduled" permanent partial disability awards. Finally, in *Lustig v. Todd Pacific Shipyards*, 881 F.2d 593 (9th Cir. 1989), the Ninth Circuit agreed that, although compensation payments for the same disability made under a state statute should be credited against the employer's Longshore Act liability in accordance with section 3(e), neither attorney fees paid to a claimant's representative, nor money paid to a medical association in reimbursement of medical expenses should be credited against the claimant's Longshore Act compensation, as neither amount was received by the claimant and no impermissible double recovery had occurred. In *Lustig*, the Court also held that the insurer during the last employment in which the claimant was exposed to a harmful substance, prior to the date on which he became aware that he had an occupational disease, is liable for compensation.

The Fifth Circuit addressed the "status" requirement for Longshore Act coverage in *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843 (1989). The Court, agreeing with the Director, held that the "status" requirement had been met where the claimant spent a significant portion of his time in longshore operations, even though he was engaged in non-maritime activities on the day he was injured. Thus, the employee was entitled to Longshore Act compensation.

The Second Circuit, in *LaFaille v. Benefits Review Board*, 884 F.2d 54 (1989), addressed an important issue of first impression under the Longshore Act Amendments of 1984, concerning the appropriate average weekly wage to be used in computing disability benefits in those occupational disease cases in which there is a delay between the onset of disability and the subsequent diagnosis of the disabling disease's occupational origin. The Court rejected the Director's position that the worker's earnings at the time of onset of disability should always be used, rather than the earnings at the time of diagnosis. Apparently, the Court so held because there was little difference between the two earnings figures in this particular case.

A significant issue of liability for death benefits under the Longshore Act, where permanent total disability commenced prior to the 1972 Amendments to the Act and death occurred several years after 1972, was decided by the First Circuit in *Director, OWCP v. Bath Iron Works (Lebel)*, 885 F.2d 983 (1989). The Court thoroughly analyzed the benefit-rate amendments made to the Act in 1972 and agreed with the Director that death benefits at the amended rates are the responsibility of the employer, rather than being payable in large part out of Federal appropriations and the Special Fund, even though the employer's liability for compensation payments to the worker for permanent total disability prior to his death had been substantially reduced in accordance with other provisions of the 1972 Amendments. In so holding, the Court rejected the only other authority on point, *Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283 (6th Cir. 1988).

An issue of first impression was favorably resolved by the First Circuit in *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722 (1989). By a two-to-one vote, the Court agreed with the Director's position that an employer that had insured its workers' compensation benefits liability under the Longshore Act remained liable for payment of compensation to its injured employee, and the survivors of a deceased employee, upon the insolvency of the carrier.

In *Rivere v. Offshore Painting Contractors*, 822 F.2d 1187

(5th Cir. 1989), the Court granted the Director's extraordinary emergency motion for summary reversal of a Benefits Review Board order staying payment of benefits awarded under the Longshore Act. In so doing, the Court affirmed the validity of the Secretary's regulation prohibiting the BRB from issuing such a stay without making a specific finding of irreparable injury based on evidence and specifying the nature and extent of the injury. The question of the Board's authority to ignore the Secretary's regulation regarding the prerequisites for granting a stay had evaded court review since 1986, when the Board first declared the regulation invalid.

Three courts issued decisions resolving jurisdictional questions arising under the Longshore Act. In *Jeffboat, Inc. v. Mann*, 875 F.2d 660 (7th Cir. 1989), the Court agreed that the 30-day period for filing an appeal to the Benefits Review Board from an adverse administrative law judge decision began on the day the judge's order was filed in the Office of the Deputy Commissioner, notwithstanding the deputy commissioner's failure to mail a copy to the employer's counsel at the time copies were mailed to the employer and employee, so that an appeal filed more than 30 days from the date of filing the order was properly dismissed by the BRB for lack of jurisdiction. The Ninth Circuit, in *Bish v. Brady-Hamilton Stevedore Co.*, 880 F.2d 1135 (1989), agreed that a decision of the Benefits Review Board, vacating and remanding for further consideration an order of an administrative law judge, was not a final appealable order. The Court joined several other circuits in holding that such remand orders are not "collateral orders" excepted from the requirement of finality even where they conclusively resolve important issues separate from the merits because the issues would be reviewable following the decision on remand. The Fifth Circuit ruled that the 30-day time for filing a notice of appeal to the Benefits Review Board is measured from the date an administrative law judge rules on a motion to withdraw a prior timely filed motion for reconsideration in *Tideland Welding Service v. Sawyer*, 881 F.2d 157 (1989). Any appeal filed prior to an administrative law judge's ruling on a timely motion for reconsideration is premature and without effect, and failure to

file a new notice of appeal after the ALJ ruled on the motion to withdraw the motion for reconsideration deprived the Board of jurisdiction to consider the appeal.

In addition to participating in cases pending before the United States courts of appeals, the Division represented the Director, OWCP, in numerous appeals filed with the Benefits Review Board, and in cases being heard by the Office of Administrative Law Judges. Several regional offices have also undertaken substantial litigation responsibilities in cases before the OALJ, as they have since this litigation was decentralized in 1987. Such participation was at least partially responsible for several administrative decisions of particular importance with regard to the continued development of the law under the 1984 Longshore Act amendments and the protection of the special fund against questionable claims filed by employers/carriers for relief under section 8(f) of the Act.

The Division also represented the Director, OWCP, in appeals filed with the Employees' Compensation Appeals Board (ECAB) under the FECA. Several important decisions involving issues of first impression were issued by the ECAB during FY 1989. In the case of *Marie D. Sinnett*, Docket No. 88-1531 (issued June 19, 1989), the ECAB addressed the relationship between the FECA and § 11 of the Debt Collection Act of 1982 (DCA) (codified at 31 U.S.C. § 3717). The OWCP had recently implemented several new procedures provided for by the DCA to assist it in its efforts to aggressively collect overpayments. In *Sinnett*, the ECAB affirmed the OWCP's imposition of interest on a debt arising from an overpayment of compensation benefits as provided in § 11 of the DCA, noting that the FECA does not prohibit the charging of interest on overpayments. The ECAB also affirmed the OWCP's use of its hearing representatives to rule on requests for waiver of interest, rather than requiring that these decisions be made by administrative law judges.

On June 1, 1987, the OWCP began to apply its new regulations, promulgated in the *Federal Register* on April 1, 1987 (52 FR 10486), to initial decisions made on claims under the FECA. These regulations significantly altered several prior

procedures employed by the OWCP, and the question of when to apply them was first addressed by the ECAB in the case of *John E. Matson*, Docket No. 89-961 (issued September 20, 1989). Turning to the supplementary information published with the new regulations, the ECAB noted that the OWCP had indicated that the new regulations were "applicable only to initial decisions made on and after the effective date" of June 1, 1987. The ECAB interpreted this phrase to mean "an initial decision on a particular issue, not a decision on any aspect of a claim." Under this construction, the ECAB affirmed the OWCP's adjudication of the employee's claim for a recurrence of disability under the new regulations, despite the fact that an earlier claim for a period of disability had been adjudicated under the OWCP's old regulations. With this decision, the ECAB approved the OWCP's application of its new regulations to the many new issues that inevitably arise out of old claims made under the FECA.

In a third case, *Gordon R. Woodruff*, Docket No. 89-390 (issued May 26, 1989), the ECAB faced a stiff challenge to its line of precedent defining the concept of "premises" for compensation purposes. The claimant had been severely injured in an automobile accident on the grounds of a military reservation during his lunch period and the OWCP had accepted his claim for payment, despite the claimant's expressed desire to file a tort action for negligence against his employer. On appeal, the claimant argued that certain Federal court determinations on the issue of what constitutes the "premises" of a Federal employing agency should control to preclude coverage under the FECA. However, the ECAB agreed with the OWCP's argument that while such Federal court determinations were instructive, they were not binding on either the OWCP or the ECAB in light of their exclusive jurisdiction granted by 5 U.S.C. § 8128(b) to decide all questions arising under the FECA.

Employment and Training Legal Services

The passage by Congress of a number of new legislative initiatives and of major revisions to several existing programs

provided substantial challenges to the Division during Fiscal Year 1989. Enactment of the Omnibus Trade and Competitiveness Act (P.L. 100-418) (OTCA) and the Worker Adjustment and Retraining Notification (WARN) Act (P.L. 100-379) necessitated rapid coordination with client agency personnel, development of regulatory packages for the new programs for dislocated workers and for plant closing/mass layoff notifications.

Subtitle D of Title VI of OTCA, the Economic Dislocation and Worker Adjustment Assistance Act (EDWAA), revises Title III of the Job Training Partnership Act (JTPA), establishing a new delivery system and new services for dislocated workers. EDWAA's requirement that regulations be published by November 1, 1988, and the need for regulations to be in place in time for planning for Program Year 1989 (July 1, 1989 to June 30, 1990) activities necessitated expeditious development of an interim final rule. This Division's staff worked with staff of the Employment and Training Administration (ETA) in developing the interim final rule which was published on October 24, 1988. A final rule was published on September 22, 1989.

The OTCA also included extensive amendments to the Trade Adjustment Assistance (TAA) program under the Trade Act of 1974, and required close coordination with State agencies in the administration of State unemployment compensation laws and the new EDWAA dislocated worker program. Most of the amendments to the TAA program took effect upon enactment of the OTCA, while others had a 90-day delay in effective date and thus took effect in November 1988. Since the States administer the TAA program as agents of the United States, under agreements with the Secretary of Labor, operating instructions were issued to the States and published in the *Federal Register* less than a month after the enactment of the OTCA. A proposal for extensively amending the TAA regulations was published in November 1988. The Division provided interpretative advice and assistance in the preparation and publication of the operating instructions and the proposed regulations, and has continued to furnish advice and assistance

as myriad questions have arisen in the TAA program and in connection with the issuance of two major changes in the operating instructions and preparation of the final regulations.

The WARN Act requires covered employers closing sites of employment or engaging in mass layoffs to provide 60 days' advance notice to workers and various governmental units. Enacted on August 4, 1988, with an effective date of February 4, 1989, the law provides no enforcement role to the Department of Labor (DOL), but mandates that the Secretary issue interpretative regulations. Prompt development of legal policy papers and opinions on this novel area of law were necessitated. This Division assisted ETA in drafting a discussion paper, which was published on October 28, 1988, and an interim interpretative rule with a request for comments, which was published on December 2, 1988. The WARN final rule, revising 20 CFR Part 639 and replacing the interim interpretative rule, was published on April 20, 1989.

The program statute for the Disaster Unemployment Assistance program also was amended this year, and the Division has provided detailed legal services in connection with discussions between ETA and the Federal Emergency Management Agency, in the preparation of operating instructions to the States, and in the preparation of amendments to the regulations. The Division also furnished advice and assistance in the drafting of the regulations for the airline employee protection program, which is not yet active in the nation.

On November 7, 1988, Congress enacted the Jobs for Employable Dependent Individuals Act (Pub. L. 100-628). The Act established an incentive bonus program for States which provide services for certain categories of individuals and move the individuals off various assistance programs and into jobs. The Division has participated with ETA staff in developing a draft proposed rule for the program.

Title II of the Family Support Act of 1988 (Pub. L. 100-485), established the Job Opportunities and Basic Skills Training (JOBS) Program, which replaces the Work Incentive (WIN) Program (Part C of Title IV of the Social Security Act

of 1935, 42 U.S.C. 630 *et seq.*), which was repealed, effective October 1, 1990. We assisted ETA in proposing regulations under this program which are to be issued jointly by the Secretary of Health and Human Services, and the Secretary of Labor.

Implementation of the new temporary alien agricultural labor certification ("H-2A") program created under the Immigration Reform and Control Act of 1986 (IRCA), P.L. 99-603, continued to provide an important focus for the Division in fiscal year 1989. The Division worked closely with the United States Employment Service (USES), the Department of Agriculture, the Immigration and Naturalization Service (INS) and other interested agencies in developing a final rule, which was published on July 5, 1989, setting a methodology for determining the Adverse Effect Wage Rate (AEWR), the hourly wage rate at which agricultural jobs for which temporary alien workers are sought must be offered in order to avoid the adverse effect of the importation of those workers. We also assisted the USES staff in developing a draft proposed rule to amend the interim final rule, to take into account comments on the 1986-87 rulemaking and to make other changes to the interim final rule.

The Division achieved a number of significant victories at the district and circuit court levels under the new H-2A program in FY 1989. The most significant victories occurred in *AFL-CIO v. McLaughlin* (D.D.C.), where farmworkers challenged the Department's June 1, 1987 H-2A regulations for determining piece rates and setting AEWRs for the importation of temporary nonimmigrant agricultural workers under IRCA.

In August of this year, the D.C. Circuit ended the two year old challenge to the methodology for determining the AEWR, ruling that the suit which had been originally filed in June 1987 was rendered moot by the publication of the new AEWR rule in July 1989. That rule adopted the same methodology but advanced a different explanation and utilized additional data beyond what had been relied on in the original regulation. Although the new rule was immediately challenged in a new law suit, the district court denied the farmworkers'

request for interim relief and denied their request to conduct discovery. At year's end, cross motions for summary judgment were scheduled with a decision expected in early 1990.

In September, the D.C. Circuit upheld DOL's regulation governing the appropriate piece rates to be paid by employers utilizing that method of payment. The regulation was challenged on the basis that DOL had not adequately explained its departure from its past policy of requiring proportional increases in piece rates and of protecting piece rate paid workers against the possibility of piece rate stagnation. The district court had accepted these arguments and struck down the regulations despite our efforts to show that there never was such a policy. The court of appeals reversed, finding that there was no policy of the sort found by the district court and, in fact, that DOL's policy consistently had been to protect workers against grower efforts to require productivity increases as hourly wages rose. The court also found that the H-2A piece rate regulation "conforms both with the DOL's past practice and with [IRCA's] requirement that domestic workers be protected from the adverse effect of alien labor."

The Division also achieved a marked degree of success in dealing with issues arising from the expanding H-2A program. As a result of the application of new sanctions to agricultural employers hiring undocumented aliens under IRCA, ranchers in Texas, and apple growers in the States of Washington and Oregon sought temporary alien labor certifications for the first time under the H-2A program. Litigation quickly ensued with respect to each new application. In *Torres v. Dole*, (W.D. Texas), DOL's "special purpose AEWR" for sheepherders was challenged. In *Alejandro-Corona v. Dole*, (E.D. Wash.), DOL's approval of a quality standard for apple pickers which was contained in a job order pertaining to an H-2A temporary labor certification application was challenged. In *Rodriguez v. Dole*, (W.D. Texas), farmworkers contended that employers must offer transportation advances. By year's end, however, the suit in *Torres* was withdrawn and the district courts in Washington and Texas, doubting the likelihood of success on the merits, had refused to grant preliminary relief to plaintiffs.

In ongoing litigation under the pre-IRCA program for the admission of temporary nonimmigrant agricultural workers (the "H-2" program), we received a number of important decisions at the district court level. The district court for the Southern District of New York, in *Morrison v. DOL*, 713 F.Supp. 664 (S.D. N.Y. 1989), dismissed all counts against DOL and the growers as moot. In that case, growers sought to change their method of payment from a piece rate to an hourly wage. The standard prevailing wage rate calculations did not provide a basis for developing a prevailing wage rate. In order to process the existing requests for workers, a decision was made to set the AEW as the prevailing rate. In its decision, the court dismissed the case on the grounds that the growers had legitimately relied on DOL's advice about the wage rates they could pay for the 1986 harvest and that it would be inequitable to require them to pay any additional wages to the workers. The only ruling in the plaintiffs' favor was the court's holding that the original prevailing rate determination was erroneous and a new methodology was needed. The court found, however, that since there was no need to use any new methodology for the 1986 harvest season, the challenges to it were moot and the plaintiffs lacked standing to challenge any future application of the methodology.

In other ongoing temporary labor certification matters, we received a favorable decision from the United States District Court for the District of Columbia in *Frederick County Fruit Growers Association, Inc. v. McLaughlin*, where the court summarily dismissed a challenge to the Secretary's application of the regulations requiring proportionately increased piece rates under the H-2 program. The court granted our motion to compel payment of back wages owing because of the growers' failure to pay the increased piece rates in the 1985 harvest season. The court rejected the growers' argument that they were not bound by the court's prior interpretation of the regulations. Even though the growers were not parties, they were aware of the pendency of the prior lawsuits, knew full well that the outcome would affect their interests, and deliberately chose not to participate.

In other immigration related matters, the court in *WJA Realty Limited Partnership v. Nelson*, (S.D. Fla.), invalidated the Immigration and Naturalization Service (INS) regulation at 8 C.F.R. § 214.2(h)(14)(iv), which regulates the status of temporary alien workers during labor disputes. The court found that the regulation, in effectively foreclosing the alien workers from exercising their right to refrain from striking, runs counter to the policy and the essential purposes of the National Labor Relations Act.

In the latest chapter in litigation commenced by the farmworker advocates in 1982, we received a favorable decision from the United States District Court for the District of Columbia. In *NAACP v. McLaughlin*, plaintiffs sought to have the Secretary held in contempt for declining to impose sanctions upon certain East Coast apple growers found to have paid unlawfully low piece rate wages to their workers during the 1986 harvest season. While not directly addressing plaintiffs' contempt argument, the court denied any relief, finding that the Secretary's refusal to impose sanctions under the Act and regulations is purely discretionary and thus immune from judicial review.

In the area of permanent alien labor certification, the Division's administrative litigation before the Board of Alien Labor Certification Appeals (BALCA) continued to mold a consistent body of precedent upon which ETA certifying officers can rely. The Division continues to provide considerable assistance to ETA in focusing ETA's efforts to respond to the developing body of BALCA case law. In a significant decision, *Information Industries*, 88-INA-82, BALCA developed a formula for applying the "business necessity" test, which requires that an employer demonstrate that any unusual job requirement is justified by business necessity. BALCA rejected the language of *Ratnayake v. Mack*, 499 F.2d 385 (5th Cir. 1971), which would have allowed employers to impose job requirements if they were reasonable but not necessary. Although BALCA adopted new language to describe the business necessity standard, the standard has thus far been applied by BALCA in a manner consistent with ETA's long standing interpretation of that term.

At the circuit court level, the court upheld the denial of labor certification in *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989). In that case, where the alien owned 51 percent of the shares of the corporation, the court agreed that the alien and the employer were one and the same and that no employment relationship existed as required by regulation. However, in *Ashbrook-Simon-Hartley, Inc. v. McLaughlin*, 863 F.2d 410 (5th Cir. 1989), the circuit court affirmed the district court, holding that DOL must take into account the job duties in its consideration of labor certification applications. We received a favorable decision from the Fifth Circuit in *The Sweet Life v. Dole*, where the court held that the employer failed to exhaust administrative remedies where it chose to ignore its appeal rights to the INS and brought an action against DOL in district court.

The Division also assisted the Employment and Training Administration in updating and "streamlining" its Job Corps regulations. A draft proposed rule was published in the *Federal Register* on March 4, 1989 and the Division assisted ETA in considering the comments on the proposed rule and in preparing the final rule.

The Division continued to participate regularly in the Department's national activities involving coordination of farmworker-related legal advice and representation at intragovernmental, departmental, and public meetings.

The Division continued to provide a wide range of advice and assistance to ETA in matters arising under the Job Training Partnership Act and worked closely with ETA in the development of new policy guidance on the uses of Fixed Unit Price Performance Based contracts under JTPA. The Division assisted ETA in its biennial selection of new grantees for Native American and Migrant and Seasonal Farmworker programs under Title IV of JTPA. The Division also worked closely with ETA in the ongoing process of providing formal advice to JTPA grantees.

While litigation under the JTPA increased, the Division continued to litigate under the Comprehensive Employment and Training Act ("CETA"). In a decision regarding ETA's right to

collect misspent CETA funds after the repeal of CETA, the Ninth Circuit, in *Inland Manpower Association v. USDOL*, 882 F.2d 343 (9th Cir. 1989), held that nothing in the transition provisions of the JTPA precluded the collection of CETA funds. The court concluded that the effect of the repeal of CETA was merely to subject proceedings commenced after September 30, 1984 to the jurisdictional and remedial provisions of the JTPA, which, the court found, are identical to those of CETA for debt collection purposes.

Specialized assistance in the area of acquisition law (i.e., contracts and grants) was provided by the Division to contract and grant officers in the Office of the Assistant Secretary for Administration and Management (OASAM), in ETA, and in the Office of the Assistant Secretary for Veterans' Employment and Training (OASVET). The Division also participated on the Department's Procurement Review Board, advised OASAM on rulemaking actions related to the Department of Labor rulemaking as part of a governmentwide common rule implementing the requirements of the Drug-Free Workplace Act of 1988 (Pub. L. 200-690) for drug-free workplaces under grants, and assisted in rulemaking actions effectuating final and proposed revisions of Office of Management and Budget Circulars A-102 and A-110 relating to agreements with State and local governments and nonprofit organizations. Division staff also have been actively involved in the implementation of the new procurement integrity rules.

The Division continued to provide a broad range of legal advice services to the Office of the Assistant Secretary for Veterans' Employment and Training in such areas as training programs for veterans, the Disabled Veterans' Outreach Program and the establishment of employment and training programs for homeless veterans under the Stewart B. McKinney Homeless Assistance Act. The Division also worked closely with OASVET in developing agreements to implement provisions of P.L. 100-527, the Department of Veterans Affairs Act, which require coordination between OASVET, DOL and the new Department of Veterans Affairs.

In the unemployment compensation area, which includes

the Federal-State unemployment compensation program and the related Federal programs of unemployment compensation for Federal civilian employees and ex-service members, the TAA program, and Disaster Unemployment Assistance, the Division furnished a wide range of legal advice and assistance to ETA and other Departmental officials. The Division furnished a variety of legal services on a host of matters arising under the Federal-State unemployment compensation program, including conformity and compliance proceedings involving permissible deductions from unemployment benefits, new requirements for the States involving the disclosure of unemployment insurance information for the purposes of the Federal Parent Locator Service in the Department of Health and Human Services and for the purposes of certain housing assistance programs under the jurisdiction of the Department of Housing and Urban Development, and the continuing controversy over the classes of aliens that may be considered to be in the eligible status of permanently residing in the United States under color of law. In addition to these matters, other important items have necessitated advice and assistance to ETA and other Departmental officials, including the proposed revision of the Quality Control program to include revenue quality control, investment of money in State unemployment funds, the required disclosure of State unemployment compensation records, the permissible and required deductions from State unemployment benefits, and the transfer to the District of Columbia government of title to the DC Employment Security building.

In litigation arising under the Trade Act, we received a favorable decision in *International Union, UAW v. Dole*, where the district court for the Eastern District of Michigan agreed with our position that the plain language of the Trade Act made federal eligibility standards mandatory upon the States and not subject to waiver and that the administrative provisions only provided for review of decisions implementing those standards under the same procedures as the State uses to hear its own unemployment insurance cases.

Fair Labor Standards

During fiscal year 1989, the Department engaged in a variety of

appellate and district court litigation of significance to the Department's fair labor standards policies and programs.

Significant appellate litigation under the Fair Labor Standards Act (FLSA) included the consolidated cases, *Brock v. Wendell's Woodwork, Inc.* and *Brock v. McGee Brothers Co.*, 867 F.2d 196 (1989), in which the Fourth Circuit affirmed the district court's judgment enjoining violations of the FLSA and its child labor provisions and awarding back wages to affected minors and other workers. The cases involved members of the Shiloh True Light Church of Christ, a sect based in Charlotte, NC. Defendants employed minors, some as young as 9 or 10 years of age, in their commercial woodworking and masonry construction businesses. Among other duties, the children operated power saws and other power-driven woodworking machinery, and forklifts in violation of the Secretary's orders proscribing the performance of such hazardous work activities. The appeals court held that "[t]he district court properly concluded . . . that the enforcement of [the FLSA and its child labor provisions] may not be defeated by a claim by a church member of free exercise rights under the First Amendment." The court concluded: "[T]he interest of the United States in the even-handed application and enforcement of its labor laws must prevail over the interests of church members who attempt to transport a vocational training program into industrial and commercial environments where children, save for their ages, are indistinguishable from other employees."

In *McLaughlin v. Ensley*, 877 F.2d 1207 (1989), the Fourth Circuit reversed the district court and held that so-called "trainees" are actually employees during an unpaid one-week orientation period when they learn the duties of delivery route drivers for defendant's snack food distribution business. The appeals court held that since the employer received significant benefits from the training, while the "trainees" received little or none, they came within the Act's coverage as employees.

In *Dole v. Petroleum Treeters, Inc.*, 876 F.2d 518 (1989), the Fifth Circuit, reversing the district court, held that workers on oil well service barges were not FLSA-exempt as seamen, because even though the workers performed some traditional

seamen duties, they spent over 50 percent of their time on oil well maintenance. The appeals court approved the Secretary's interpretation, which specifies that the exemption depends on the actual duties performed and that the exemption is available only where workers spend no more than 20 percent of their time on non-maritime duties. Rejecting the district court's analysis, the appeals court held that the applicability of the exemption is independent of an employee's status as a seaman for purposes of the Jones Act.

The Fourth Circuit entered a favorable decision in *Brock v. Hamad*, 867 F.2d 804 (1989), affirming the district court's judgment enjoining Hamad from violating the minimum wage, overtime, and recordkeeping provisions of the FLSA and awarding back wages and liquidated damages. The appeals court upheld the district court's holding that Hamad's rental of residential properties constituted a single enterprise, rejecting arguments that Hamad's operation of the rental properties (which were owned by him or members of his family) lacked a common business purpose and that they were not subject to Hamad's common control; that his enterprise, which he characterized as strictly local in nature, was outside the coverage of the Act pursuant to the Act's "ultimate consumer" provision, 29 U.S.C. 203(i); and that the rental income for the properties should be prorated among the separate owners for purposes of determining whether the volume of business exceeds the \$250,000 threshold for enterprises.

The Fifth Circuit issued a favorable decision in *McLaughlin v. Seafood, Inc.*, 867 F.2d 875 (1989), reversing the district court's decision that piece-rate workers in a seafood processing plant were independent contractors and not employees within the meaning of the FLSA. The Fifth Circuit held that the piece-rate workers were employees even though their employer did not regulate the hours or the details of their work and did not prevent them from working for its competitors. In a case presenting a similar issue, *Dole v. Snell d/b/a Cakes by Karen*, 875 F.2d 802 (1989), the Tenth Circuit, reversing the district court, held that workers decorating cakes on the defendant-bakery's premises were employees entitled to

FLSA protection. In reaching its decision, the appeals court held that the decorators, who were paid on a piece-work basis, had no control over the essential determinants of profits in the business and that the decorators' \$400 investment in their tools did not compare with the defendant's investment in the total business.

In *Brock v. R.J. Auto Parts and Service, Inc.*, 864 F.2d 677 (1988), the Tenth Circuit reversed the district court's dismissal of the Secretary's FLSA action. The district court dismissed the case as a sanction for the Secretary's refusal during discovery to disclose the identity of persons who had provided information to the Secretary in connection with the FLSA investigation. The appeals court, applying traditional discovery principles relating to the pretrial identification of prospective witnesses, held that the district court erred in dismissing the action and imposing litigation costs on the Secretary.

In *Brock v. Best Western Sundown Motel*, 883 F.2d 51 (1989), the Eighth Circuit affirmed the district court's decision that a family-owned restaurant and motel constitute a single enterprise for purposes of FLSA coverage. The appeals court, rejecting the employer's argument, held that the district court correctly received testimony from former employees regarding the ongoing organization of the employer's business, even though these witnesses were employed prior to the back wage period encompassed by the case. The appeals court also rejected the employer's argument that the district court improperly relied upon the testimony of an employee who recanted her testimony after the trial in the case.

In *McLaughlin v. Hogar San Jose*, 865 F.2d 12 (1989), the First Circuit entered a partially favorable decision affirming the district court in all respects despite cross appeals by the Secretary and the employer in this FLSA case involving minimum wage and overtime violations by a nursing home. The First Circuit held, in substance, that the district court's finding that the employer had acted in good faith was not clearly erroneous, and that the district court did not abuse its discretion in relieving the employer from liquidated damages. The First Circuit upheld the district court's back wage award,

challenged by the employer, on the "clearly erroneous" standard of review.

In *Elsberry Inc. v. McLaughlin*, 868 F.2d 1525 (1989), the Eleventh Circuit held that the Secretary is authorized by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to make warrantless entries of labor camps and fields to pursue investigations and that MSPA's provision for such entries is not a violation of the Fourth Amendment. The court also held that a grower's nonforcible efforts to frustrate the Secretary's investigation did not constitute unlawful resistance or interference prohibited by the Act.

In *Lockert v. McLaughlin*, 867 F.2d 513 (1989), the Ninth Circuit upheld the Secretary's decision in a case arising under the whistleblower provision of the Energy Reorganization Act (ERA). The court held that there were adequate factual and legal grounds to support the Secretary's determination that the employee was not fired from his quality control position with the Pullman Power Products Corp. for engaging in protected safety-related activities.

In *English v. Whitfield*, 858 F.2d 957 (1988), another case arising under the ERA, the Fourth Circuit issued a largely favorable decision. In affirming the Deputy Secretary's ruling that the employee's complaint was time-barred, the court held that the filing period begins to run on the date that the employee is given definite notice of the challenged employment decision, rather than the date when the decision is effectuated. The court declined to salvage the employee's discharge claim on a continuing violation theory because the communication of the discharge decision was a discrete, immediate violation. The court remanded the case for consideration of an independent claim which had been imprecisely raised by the employee in the administrative proceeding--that she was subjected to continuing harassment during the period when she was awaiting discharge.

In *Thompson v. Department of Labor*, No. 87-7509, the Ninth Circuit reversed the Secretary's entry of an order in this whistleblower case dismissing the case with prejudice. The court ruled that the Secretary erred in dismissing the case with prejudice because the parties, in reaching an agreement to settle

the case, had not agreed that the case should be dismissed on this basis. The court remanded the case for further consideration by the Secretary. Attorney fees were awarded under the Equal Access to Justice Act.

In *Couty v. Department of Labor*, No. 88-2233, the Eighth Circuit held that the Secretary erred in concluding that the complainant had failed to demonstrate retaliatory motive as an element of his *prima facie* case in this whistleblower proceeding. The court ruled that such motive could properly be inferred by the close temporal proximity between safety-related complaints by the employee and his discharge by his employer. The case was remanded for further proceedings.

Under the contract labor standards program, in *Facchiano v. U.S. Department of Labor*, 859 F.2d 1163 (1988), the Third Circuit held that a contractor must first exhaust the Department's administrative procedures before seeking judicial review of a decision arising from application of federal contract labor standards. The court also ruled that the Department must consider the contractor's argument that debarment imposed by a contracting agency precludes the Labor Department from imposing a governmentwide debarment based on the same violations.

In *Holt Co. v. IBEW*, 868 F.2d 671 (1989), the Fourth Circuit upheld the district court's decision rejecting the Secretary's interpretation of section 4(c) of the McNamara-O'Hara Service Contract Act (SCA) to authorize a "substantial variance" proceeding at the request of a union seeking to raise the wage rates in a contract. The court held that section 4(c) authorizes proceedings only to lower the rates, not to raise them. There was a vigorous dissent, asserting that the statutory language is ambiguous and that deference is owed the Secretary's longstanding interpretation, permitting both increases and decreases in contract rates where they are in substantial variance with local prevailing rates. Although the Secretary participated before the district court, the Secretary did not participate in the appeal.

There are several matters of significance pending in the appellate courts. In *Secretary of Labor and EEOC v.*

Shenandoah Baptist Church, 4th Cir. No. 89-2341, cross appeals have been filed from the district court's judgment awarding back wages for minimum wage and equal pay violations of the FLSA. The defendant church operates the Roanoke Valley Christian School, which teaches children from preschool through high school. The school's non-teaching personnel were paid less than the minimum wage; the school's female teachers were paid less than male teachers performing comparable work. The district court rejected the defense of the church and some of its members (as intervenors) that the relevant statutory provisions did not apply to the school since it was part of the church and therefore outside the reach of the FLSA's enterprise coverage. The court also rejected the argument that the Act, as applied to the church, unconstitutionally infringed upon its rights under the First Amendment. Defendant and intervenors have appealed these rulings. The Secretary and the EEOC have appealed the district court's rulings denying prejudgment interest and injunctive relief.

In *Dole v. Woodley*, 5th Cir. No. 89-5577, the Secretary is contesting the district court's largely favorable judgment insofar as it allowed the employer credit against minimum wages due migrant workers for the cost of employer-supplied housing which was declared unfit for human habitation by state authorities. In *Dole v. Hopple Plastics, Inc.*, 6th Cir. No. 89-5696, the Secretary seeks to overturn the district court's ruling, denying on a laches theory the Secretary's claim that an employee (who was fired from her job in violation of the Consumer Credit Protection Act) is entitled to reinstatement and back wages. In *West Extension Irrigation District v. Secretary of Labor*, 9th Cir. No. 89-35124, the Secretary is seeking to sustain the district court's finding that a public agency operating an irrigation system cannot invoke the Act's "irrigation exemption," where some of the water controlled by the agency is utilized for nonagricultural purposes. By its terms, the exemption is restricted to "the operation or maintenance of [systems] which are used exclusively . . . for agricultural purposes." In *Brock v. Gingerbread House*, 10th Cir. No. 85-2021, the Secretary is challenging the district court's rulings

dismissing the Secretary's FLSA complaint as a sanction for refusing to identify informants and denying the Secretary's claim that the employer's third-party indemnification action against employees named in the Secretary's complaint constitutes retaliation forbidden by section 15(a)(3) (decision reversing district court, but without reaching third-party action question, issued October 18, 1989).

In *Pacific Merchant Shipping Association v. Aubry*, 9th Cir. No. 89-55379, the Government as *amicus* is supporting the State of California's position that it is not prohibited as a matter of statutory, admiralty, or constitutional law from enforcing its wage and hour standards to seamen and other maritime workers employed on vessels located off the California coast. The Secretary is seeking to overturn the district court's holding that the FLSA operates to preempt California from applying its law to the workers in question. In *Nichols v. Hurley*, 10th Cir. No. 89-7033, the Secretary is participating as *amicus* in support of employees seeking to overturn the district court's conclusion that deputy sheriffs are exempt from FLSA coverage as the personal staff of an elected official.

There have been several noteworthy decisions concerning the labor standards applicable to federal contracts. In *A to Z Maintenance v. Dole*, 710 F. Supp. 853 (D.D.C. 1989), the district court, applying the Secretary's three-part test for assessing whether debarment is appropriate for violations of the SCA, concluded that the Department's debarment decision was supported by a preponderance of the evidence and was not arbitrary or capricious. The court held that earlier SCA violations by the contractor (though occurring under "unusual circumstances" and mitigating against debarment in those past instances) nevertheless constituted prior violations. In *Helicopter Pilot's Association v. Dole*, S.D. Ala. No. 89-H-288-S, a mandamus action seeking an order to direct the Wage and Hour Administrator to issue a ruling concerning an SCA wage determination, the district court granted the government's motion to dismiss for lack of standing. The court also observed that attorney fees, which had been sought by petitioner under the Equal Access to Justice Act, were not appropriate because,

even if its action served as the catalyst for a ruling by the Administrator, no benefit had inured to petitioner. In *United Health Serv, Inc.*, 89-CBV-1 (DJR), a decision issued jointly by two administrative law judges, the judges granted summary judgment against the Air Force, which had sought "substantial variance determinations" in several consolidated cases pursuant to section 4(c) of the SCA. The judges held that a substantial variance can only be established where unusual circumstances exist, e.g., less than arms-length negotiations; they also held that substantial variance cannot be established where the collectively bargained rates are not higher than the federal wage board rates for comparable positions. The judges' conclusion, if ultimately upheld on appeal, would substantially curtail the availability of section 4(c) to contractors and contracting agencies, and would constrict the Wage and Hour Administrator's discretion in referring such cases for hearings. In a case handled by the Atlanta region, *U.S. Department of Labor v. DWS, Inc.*, No. 87-SCA-129, a successful settlement was obtained in this SCA case whereby the ALJ adopted consent findings that had been entered by the bankruptcy court in a proceeding involving DWS, a company providing helicopter instruction at Fort Rucker, AL. Under the findings the affected employees likely will receive full payment on SCA wages and fringe benefits owed them.

In a case arising under a new statute, the Employee Polygraph Protection Act, which became effective on December 27, 1989, the district court held that the plaintiff, a polygraph examiner, lacked standing to challenge the constitutionality of the Act because he did not fall within the "zone of interests" protected or regulated by the Act. *Gugas v. McLaughlin*, C.D. Cal. No. 88-04745.

In *Southwest Lighthouse for the Blind, Inc.*, No. 89-FLS-1, an administrative law judge hearing has been scheduled on a petition for review of the special minimum wage rate paid by the employer. The petition was filed on behalf of several employees pursuant to 29 U.S.C. 214(c)(5)(A). This will be the first hearing under this section of the FLSA.

Several actions seeking enforcement of the industrial homework restrictions imposed by the Department's FLSA

regulations have been instituted by the regional offices. In one case, *Brock v. Bordeaux, Inc.*, S.D. Iowa No. 86-104, the Kansas City region, after extensive discovery, reached settlement whereby the employer agreed to pay back wages of more than \$150,000 to seamstresses who had been employed in violation of existing homework prohibitions (embroideries industry); a permanent injunction was also obtained against the employer.

As the discussion above demonstrates, the regional offices have pursued a variety of significant cases. These enforcement efforts continue. The New York region reports several FLSA cases. In *Dole v. DialAmerica Marketing, Inc.*, D. N.J. 716 F. Supp. 812 (D. NJ. 1989) the district court entered a favorable decision, finding that defendant violated the Act's minimum wage and recordkeeping provisions. The company employs homeworkers to research telephone numbers for its telephone marketing program. Relying upon representative testimony of employees and statistical evidence offered by other witnesses, the court determined that the Secretary had proven the violations and provided a sufficient basis upon which to compute back wages. Awarding injunctive relief and prejudgment interest, the court directed that proceedings be held before a magistrate for calculation of amounts due individual employees. A total award of about \$400,000 is expected. In *McLaughlin v. Tri-Way Security and Escort Service, Inc.*, E.D. N.Y. No. 87-CIV-0122, the Secretary received a favorable decision enjoining overtime and recordkeeping violations and awarding overtime compensation over \$300,000, plus an equal amount of liquidated damages to about 650 security guards. After paying about \$170,000, defendants filed for bankruptcy. In *Dole v. Waldbaum, Inc.*, E.D. N.Y. No. 86-861, the Secretary is seeking overtime compensation for approximately 400 employees. Back wages are estimated in excess of \$2 million. In *Dole v. State of New York*, N.D. N.Y. No. 89-CV-1110, the Secretary is seeking back wages, and injunctive relief in an action alleging that the State of New York has violated the FLSA by failing to pay overtime to criminal investigators employed by the State's Bureau of Criminal Investigation; the State claims that the investigators

are FLSA-exempt administrative employees. In *Dole v. Cooper Electric Supply Co., Inc.*, D. N.J. No. CV-87-2568, the Secretary seeks to enjoin overtime violations. Defendants have asserted that the affected employees, who work as inside sales persons, are exempt as administrative employees. In *Dole v. Haulaway, Inc.*, D. N.J. No. CV-87-2938, the Secretary obtained a judgment for \$875,000 in overtime compensation and liquidated damages due 185 garbage truck drivers and helpers. In *Dole v. State of New York*, ND. N.Y., No. 89-CV-850, the Secretary has entered into a consent judgment and the New York State Division for Youth (DFY) shall pay over a period of 3 years, of about \$3 million in overtime compensation due about 500 employees. The DFY operates community residences to provide for the needs of youths referred to the agency by state courts. The agency paid individuals employed as houseparents only a straight weekly salary for 40 hours, although they worked as many as 70 hours.

The Atlanta region reports several decisions yielding substantial monetary awards. In *Dole v. Potter Enterprises, Inc.*, N.D. Ga. No. 4:87-CV-323-HLM (1989), the Secretary obtained a consent judgment enjoining construction and rental businesses from future violations of the FLSA and ordering payment of back wages and liquidated damages of about \$500,000. In *McLaughlin v. Weddington Tucker Company, Inc.*, E.D. Ky. No. 87-221 (1989) and *Dole v. Furtex Fabrics, Inc.*, E.D. Tenn. No. 3-89-4 (1989), defendant-companies were enjoined from shipping goods after the companies missed payrolls. The "hot goods" injunctions in these FLSA actions resulted in the recovery of substantial back wages for affected employees. In *Dole v. Morgan*, W.D. Tenn. No. 78-2387 (1989), the Secretary obtained a judgment in civil contempt against defendant who persisted in violations of the FLSA that had earlier been enjoined; additional back wages, liquidated damages, and interest (on unpaid back wages under the original judgment) totaling about \$200,000 were awarded. In *United States v. Phillips*, N.D. Fla. No. 89-05-007-RV (1989), the U.S. Attorney's office successfully prosecuted defendants under 18 U.S.C. 1505 for "obstruction of proceedings." The prosecution stemmed from defendants'

actions requiring employees to "kick back" FLSA back wages distributed under an administrative settlement. In *Dole v. Opryland Hotel, a division of Opryland, U.S.A., Inc.*, M.D. Tenn. No. 3-89-0246, discovery is underway in this FLSA action alleging minimum wage, overtime, and recordkeeping violations. The Secretary asserts that about 5,000 employees are owed back wages for the uncompensated time expended by them in changing into and out of uniforms (some of which were elaborate and time-consuming to put on) required by their employer.

In a number of cases, the Philadelphia region has obtained substantial monetary awards and favorable rulings on significant legal issues. In *Dole v. Solid Waste Services*, E.D. Pa. No. 88-1066 (1989), over \$750,000 was awarded as back wages and liquidated damages against the employer; the court enjoined the employer's future compliance with the FLSA and held that the violations were willful. In *Dole v. Odd Fellows Home Endowment Board*, No. 84-0096 (N.D. W.Va., 1989), the court awarded about \$175,000 in backpay for minimum wage and overtime violations by the employer. The court found that the employer operated a place of care for elderly and sick persons and therefore was an enterprise within the meaning of the Act. The court rejected the employer's attempt to take meal and lodging credits against the employees' wages, given the absence of records and the inability of employees to take lunch breaks. In *McLaughlin v. Brennan Truck and Auto Repair*, 700 F. Supp. 272 (W.D. Pa. 1988), the court disallowed the employer's claim that its mechanics were exempt from the FLSA's overtime requirements by virtue of the "motor carrier" exemption. The employer, though possessing conditional "motor contract carrier" authority from the Interstate Commerce Commission, lacked proper insurance and had not actually engaged in any contract hauling. In *McLaughlin v. Racoon Mining Co.*, S.D. W.Va. No. 2:87-0372 (1988), the district court ruled that two former owners of a corporation were employers within the meaning of the FLSA and that their liability for wage violations did not terminate when they later sold their interest. The court observed that even if the contract of sale had manifested an

intent to terminate their liability, "the contract would appear to be void as contrary to public policy."

The Philadelphia office has several significant cases pending in district courts. In *Dole v. Devachan Ltd., t/a "Deva"*, D. Md. No. HM-89-633, the Secretary is seeking to enjoin the use of homeworkers by an employer in the women's apparel industry; the employer has challenged the constitutionality of the homework prohibitions, their application to "unisex" clothing, and the employee status of the homeworkers. In *Dole v. Southern Maryland Hospital*, D. Md. No. B-87-3141, back wages of more than \$1 million and injunctive relief is being sought for overtime violations of the FLSA.

The Chicago office received a favorable decision in *McLaughlin v. Lunde Truck Sales*, 714 F. Supp. 916 (N.D. Ill. 1989). The district court held that an employer waived its attorney-client privilege by filing an affidavit of its counsel in support of its good faith reliance defense; the court concluded that the attorney-client privilege could not be invoked to deny the Secretary discovery of information relating to the defense.

In *United States v. Kazminski*, E.D. Mich. No. 83-CR-70025-AA, individual employers, who required two retarded adults to work on their farm for several years, pleaded guilty to an information charging them with a violation of the FLSA's criminal provision.

The San Francisco office received a favorable decision in *Dole v. Statewide Investigations, Inc.*, D. Nev. No. CV-S-84-104 (1989), enjoining defendant's FLSA violations and obtaining back wages and liquidated damages for affected employees. The company required its minimum wage employees, who worked as security guards, to purchase at their own expense a handgun and related equipment. The court held that the cost of such equipment was properly an operating expense of the employer; the court ruled that the company violated the Act by charging the employees with this expense and thereby reducing their compensation below the FLSA minimum wage.

The Dallas region reports several significant cases. In *Dole v. Tony and Susan Alamo Foundation*, W.D. Ark. No. 77-2183, the Secretary, in December 1977, filed an action to enjoin

the defendants from violating the minimum wage, overtime compensation, and recordkeeping requirements of the FLSA and to restrain them from withholding payment of minimum wages and overtime compensation. Following largely favorable rulings by the district court (and by the Eighth Circuit and the Supreme Court on review), the Dallas region, in 1989, filed a motion to adjudge defendants in civil contempt for continuing to withhold payment of minimum wages and overtime compensation together with prejudgment and post-judgment interest. In *Secretary v. George and Cora Ann Ing d/b/a Mandarin Gardens*, W.D. Ok. No. CIV-82-1585-R, the Secretary reached a favorable settlement, approved by the district court after the employer's bankruptcy filing, whereby the employer was enjoined to comply with the FLSA and to pay back wages of more than \$125,000, plus prejudgment and post-judgment interest. In *Secretary of Labor v. Cadillac Development Corp.*, S.D. Tex. No. ____, the Secretary filed an FLSA action to enjoin willful overtime and recordkeeping violations and to restrain the withholding of overtime compensation due to hundreds of construction workers, many of whom were illegal aliens for which no records had been maintained. The Secretary negotiated a favorable resolution of this case and a related civil rights action initiated against the Department and Wage and Hour officials, with full prospective injunctive relief against defendants, recovery of over \$185,000 in back wages, and complete dismissal with prejudice of the action against the Department and its officials. In *Dole v. Rose City Pentecostal Church of God*, E.D. Ark. No. LR-C-88-798, the Secretary seeks to enjoin the church from violating the minimum wage and recordkeeping requirements of the FLSA and to restrain it from withholding payment of minimum wages due supervisors and monitors employed at the Rose City Christian Academy. The case raises numerous constitutional issues.

In *Secretary of Labor v. Loggy Bayou Industries, Inc.*, W.D. La. No. 89-1246, filed by the Dallas region, the Secretary seeks relief under section 15(a)(3) of the FLSA. This case involves retaliation against both an employee-complainant and his supervisor (who was terminated for protecting the complainant's

identity). In *Dole v. North American Cabinet Corp.*, E.D. Tex. No. M-88-0151-CA, another section 15(a)(3) action, the Secretary alleges that a state court declaratory judgment action filed by an employer constitutes discrimination under 15(a)(3).

The Division provided legal assistance in connection with the promulgation of several final regulations and regulatory proposals. On October 1, 1988, a final rule governing the submission of reports by employers of special agricultural workers employed in seasonal agricultural services took effect. The reports are required by the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA). A final rule was also issued jointly by DOL and the Department of Agriculture to determine whether there is a shortage of workers in seasonal agricultural services within the meaning of IRCA, and therefore whether replenishment agricultural workers should be admitted.

On October 21, 1988, the Department issued an interim final rule, effective December 27, 1988, implementing the Employee Polygraph Protection Act of 1988; the Act and the regulations protect most private sector employees or applicants for employment from lie-detector testing with certain limited exceptions.

On November 10, 1988, the Department issued a final rule, effective January 9, 1989, lifting certain restrictions on homework under the FLSA, 29 U.S.C. 211(d), in five industries: non-hazardous jewelry manufacturing, gloves and mittens, buttons and buckle manufacturing, handkerchief manufacturing, and embroideries. The final rule, which also applies to the knitted outerwear industry, permits employers to operate under certificates, and includes a variety of other measures to improve and strengthen FLSA enforcement with regard to homeworkers. The Division is assisting the Justice Department in defending the regulations against challenge in *ILGWU v. Dole*, D. D.C. No. 89-0027. The Department also issued an advance notice of proposed rulemaking, on Dec. 30, 1988, proposing to modify the existing homework prohibition in the women's apparel industry. The Division supplied legal support for several hearings conducted throughout the country regarding this proposal.

On January 27, 1989, the Department issued a final rule under the Davis-Bacon Act, allowing the use of helpers on federally funded construction projects where the use of helpers in a craft is a prevailing practice. The Department has asked the District Court for the District of Columbia in *Building and Construction Trades Department, AFL-CIO v. Dole*, No. 82-1632, to lift an existing injunction against the Department (imposed during a challenge to an earlier helper regulation) on the basis that the regulation now conforms to the court of appeals decision in *Building and Construction Trades Department, AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983).

The Department issued a final rule, effective May 1, 1989, implementing changes in MSPA brought about by IRCA concerning the utilization of undocumented workers. The rule also clarified registration procedures governing the submission of renewal applications by farm labor contractors.

On August 10, 1989, final regulations were published concerning payment of subminimum wages to disabled workers under section 14(c) of the FLSA. The regulations consolidate and update existing regulations in light of 1986 amendments to the FLSA which simplified procedures for issuance of certificates by the Department and added a procedure whereby disabled workers may petition for review of their subminimum wage rates; the new regulations took effect on September 11, 1989.

On August 21, 1989, the Department issued a final rule which deletes the special enforcement policy and notification procedures relating to the identification of traditional and nontraditional governmental functions under the FLSA. These provisions became obsolete as a result of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

On June 22, 1989, the Department proposed rulemaking to establish a new alternative definition for "regular dealer" under the Walsh-Healey Public Contracts Act. The proposed definition would apply to so-called "systems integrators," i.e., government contractors engaged in the business of providing fully operational information processing systems.

This Division is representing the Solicitor's Office at all general and subcommittee meetings of the Child Labor Advisory Committee. The committee periodically recommends to the Wage and Hour Administrator whether and to what extent the Department's FLSA child labor regulations should be revised. Currently under consideration by the committee are regulations which (1) govern when and in what occupations 14- and 15-year olds may be employed and (2) prohibit (among other things) the set-up, operation, dismantling, or cleaning of power-driven bakery machinery or paper product machinery by minors under the age of 18. The committee's charter has been renewed by the Administrator and will extend until August 5, 1991. To date, the committee has issued several recommendations, among which are those concerning the operation of meat processing equipment, the operation of motor vehicles, and the hours during which minors under 16 may work.

The Division also supplied legal support to the Department in connection with various legislative proposals. Particular attention was directed to proposals to amend the FLSA, including those which would increase the minimum wage and provide for a training wage; proposals to amend the Davis-Bacon Act; and proposals for new legislation to protect certain whistleblowers who are not protected by current statute.

Labor-Management Laws

In the fiscal year 1989, the Division of Labor-Management Laws filed complaints in suits arising under the Labor-Management Reporting and Disclosure Act (LMRDA), defended the Secretary's determination not to sue under the Act, rendered advice on legal issues, and participated in negotiated settlements for remedial elections of union officers. The Division also participated in litigation and provided advice on issues arising under the Civil Service Reform Act, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRA), the Urban Mass Transportation Act (UMTA), the Airline Deregulation Act (ADA), the Redwood National Park Expansion Act (REPP), the Freedom of Information Act (FOIA), and the Equal Access to Justice Act (EAJA). The Division provided legal advice to the

Bureau of International Affairs on various statutes relating to international trade and investment and on matters pertaining to participation of the United States in the International Labor Organization. Finally, the Division offered advice and consultation on proposed legislation affecting these statutes and programs. A substantial portion of the Division's litigation during the year dealt with union officer elections under Title IV of the LMRDA.

In a subpoena enforcement action, the court of appeals reversed an order to enforce subpoenas issued by the Secretary of Labor pursuant to the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531. The Secretary had issued subpoenas under 29 U.S.C. § 521(a) in order to investigate the Political, Educational, Legislative, Charity and Defense Fund associated with Plumbers Local 375. The district court found that the Fund was not an association entitled to first amendment rights. The court of appeals reversed and remanded stating that the Fund can attempt to show infringement of its members' first amendment associational rights regardless of whether the Fund is totally independent from the union or merely a bank account of the union. *Brock v. Local 375, Plumbers International Union of North America*, 860 F.2d 346 (9th Cir. Oct. 28, 1988).

In a challenge to an international union officer election, the court held that the LMRDA was violated when union funds were used to promote the candidacy of a challenger for union office. The court found a violation based on the publication in three local union newspapers of seven articles critical of the incumbent national president. The court rejected the union's argument that applying section 401(g) to the newspaper articles violated the First Amendment. Additionally, the use of a local's logo on a campaign letter distributed to voting delegates at the national convention was found to violate section 401(g). *McLaughlin v. American Federation of Musicians of the United States and Canada, AFL-CIO*, 700 F. Supp. 726 (S.D.N.Y. Nov. 23, 1988).

In a defensive case where the plaintiffs alleged that the Department's decision to conduct a supervised election for only

certain offices was arbitrary and capricious, the court held that the Statement of Reasons was well supported and was not arbitrary and capricious. *Elsie James, et al. v. McLaughlin*, No. 88-65740AWT(Kx) (C.D. Cal. Dec. 29, 1988 on appeal).

In a noteworthy decision, the Seventh Circuit Court of Appeals held that the Secretary did not have to disclose the names of informants who had assisted the government in litigation arising under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 481. The court ruled that the government is granted the informer's privilege as a matter of right and does not have to make a threshold showing of reprisal or retaliation. Further, the court found no waiver of the privilege where the government disclosed names of persons who were knowledgeable about the matter. The court also held that the district court's error was not cured by the offer of a protective order which would have allowed the defendant's counsel to learn the identities of the informers without revealing them. *Dole v. Local 1942, International Brotherhood of Electrical Workers, AFL-CIO*, 870 F.2d 368 (7th Cir. Feb. 28, 1989).

In a subpoena enforcement case involving an International union, the Ninth Circuit Court of Appeals held that the district court did not abuse its discretion in denying full enforcement of an administrative subpoena. The subpoena, issued during the course of an investigation of an international union's election of officers, sought from that parent body related election records and financial data of subordinate local unions. The court held that the Secretary failed to carry the burden of proving that the international had the necessary control to obtain the local's records on demand. The bases for this holding include the lack of an express provision in federal statutes or in the union's constitution establishing this control and the lack of any showing of actual control. The court specifically rejected analogizing the control between a parent corporation and its subsidiaries to labor organizations or relying on the inherent relationship between the levels of the union. The court also noted that the Department of Labor could have obtained the records directly from the locals but did not ask for

them. *United States v. International Brotherhood of Petroleum and Industrial Workers*, 870 F.2d 1450 (9th Cir. Mar. 21, 1989).

In a case of first impression involving a national union, the court held that the union's denial of the right to run for office because the candidate exceeded the maximum age permitted by the union's constitution was a violation of the Act. The court declared unlawful the union's constitutional provisions limiting eligibility for candidacy based upon age. *Dole v. American Federation of State, County and Municipal Employees, AFL-CIO*, No. 88-2743 (D.D.C. Mar. 30, 1989).

In this favorable decision involving an international union, the court held that the union violated section 401(e) of the LMRDA, 29 U.S.C. § 481(e), by refusing to count some mail ballots returned in bulk. The court concluded that the union's action constituted an unreasonable deprivation of the opportunity to vote because neither the union's constitution nor the ballot instructions prohibited the mailing of ballots in bulk and the Chairman of the Board of Electors had advised that bulk mailing was acceptable. *Dole v. Graphic Communications International Union*, Civil Action No. 88-3001 (D.D.C. Sept. 22, 1989).

During this past year there were several rulings concerning the discretion a court has with respect to fashioning a remedy under the LMRDA.

In a generally favorable decision, the court set aside the 1985 election for certain offices. However, instead of ordering a new election under the supervision of the Department of Labor, the court directed that the next regularly scheduled election for that office to be held in January-February 1991 be supervised by the Secretary of Labor, finding that equitable considerations required a remedy other than an immediate supervised election. The Second Circuit Court of Appeals affirmed. *Brock v. Local 471, Hotel, Motel & Restaurant Employees and Bartenders Union*, 706 F. Supp. 175 (N.D.N.Y. Feb. 15, 1989).

In another decision, the United States Court of Appeals for the Eighth Circuit ruled that in certain narrow circumstances the district court has equitable discretion to refuse to order a new election supervised by the Secretary of

Labor, even though the court finds a violation of the LMRDA. The court did not establish a rule as to what circumstances would warrant this action. However, in this case, the court found a supervised rerun election unnecessary where the union, during the time this case was pending, repealed the by-law provision found to violate the LMRDA and held an untainted regularly scheduled election supervised by an expert labor consultant. The Department of Labor had argued that the district court erred in finding that an intervening election rendered moot its request for a new election and that the court improperly refused to order a new election under the supervision of the Secretary. *McLaughlin v. Lodge 647, International Brotherhood of Boilermakers*, 1989 U.S. App. LEXIS 15563 (8th Cir. June 1, 1989).

In an unusual holding, the district court granted the union's motion for summary judgment, while agreeing with the Secretary that violations of section 401(g) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §481(g), had occurred. However, the court disagreed with the Secretary's position with respect to the effect of the violations on the outcome of the election. The court held that it would contravene the purposes of the LMRDA to nullify this election in which the successful insurgent slate was innocent of wrongdoing. The court however did order the Secretary to "oversee" the union's next regular election because of evidence that the union had engaged in election improprieties in past elections. *Dole v. Local 226, Hotel & Restaurant Employees*, 1989 U.S. Dist. LEXIS 9029 (D. Nev. July 10, 1989).

The Fourth Circuit Court of Appeals, in a private action brought pursuant to section 401(c) of the Act, granted a rehearing en banc. The Secretary was allowed amicus standing to brief and argue in support of the lower court's decision. That court held that the test to be applied in a case involving distribution of campaign literature was whether the request was reasonable and not the union rule. *Brown v. Lowen*, Civil Action No. 88-2876, rehearing pending.

In connection with the administration of the Veterans' Reemployment Rights (VRR) provisions of the Vietnam Era

Veterans' Readjustment Assistance Act (VEVRA), the Division completed its work with an Interagency Working Group. The objective of the working group was to review the statute to determine whether any amendments are required to make the statute more effective, particularly in light of the changing staffing needs of today's military. The completed work covered problem areas which included the need for clarification of the statute regarding coverage and benefits; enforcement of the law on behalf of Federal employees; current delays in enforcement; and incomplete statutory remedies. In this connection the Division drafted new legislation consistent with the Working Group's recommendations. The proposed legislation is awaiting final Departmental and Executive Branch approval before being transmitted to Congress.

During this fiscal year, the Division also participated in the training of all members of the Veterans Employment and Training Services (VETS) at the National Veterans Training Institute by providing instruction regarding the operation and interpretation of the VRR statute. The Division continued to provide legal opinions and advice on an ongoing basis to assist in the enforcement program and also to review and provide guidance regarding possible appeals of district court decisions.

In a privately litigated suit brought under the VRR statute, the district court struck down the Baltimore City Police Department's regulation limiting the number of police officers who could enlist in the active military reserves. The court also awarded the claimant retroactive benefits for the compensation lost in 1986 due to the prohibition. Cross appeals were filed. Both issues are significant matters of first impression in the appellate courts. This Division filed a brief in the U.S. Court of Appeals for the Fourth Circuit as *amicus curiae* supporting affirmance of the district court's decision on the merits, but urging modification of the award to provide for a "make whole" remedy in line with the statutory language. See *Tilghman v. Kolkhorst*, 110 LC ¶ 10,937 (D. Md. 1988), amended order entered, No. JFM-86-3057 (D. Md. Feb. 15, 1989), appeal filed, No. 89-3501 (4th Cir. Mar. 14, 1989), cross-appeal filed, No. 85-3502 (4th Cir. Mar. 17, 1989).

The Division continued to review proposed Deputy Under Secretary decisions involving claims for benefits under the Redwood National Park Expansion Act and to prepare legal opinions regarding those decisions or other issues related to this statute and program. As a result of the Department's continued efforts during this fiscal year and the previous one, most administrative appeals under the Act have been adjudicated to conclusion.

Inasmuch as Section 13(c) of the Urban Mass Transportation Act (UMTA), 29 U.S.C. § 1609(c), provides that the Department of Transportation may not make a mass transportation grant until the Department of Labor has certified that fair and equitable labor protective arrangements have been made to ensure that the mass transit employees are not adversely affected by the Federal financial assistance, the Division continued to devote a substantial amount of time providing legal advice to Department officials regarding these issues during FY 1989. Also during this fiscal year, procedures have been implemented which may provide this Division with earlier notice of problems in the certification process.

If a labor organization is not satisfied with the terms of the Department of Labor section 13(c) certification, the labor organization, under certain circumstances, may file suit challenging the certification. In *Railway Labor Executives' Association v. Dole*, No. 89-2633 (D.D.C. filed September 21, 1989), the Association challenged the ability of the Department to issue certifications for any UMTA project presented by the Massachusetts Bay Transit Authority (MBTA) because of positions taken by MBTA in state court. In this case, the Association sought to enjoin the Secretary of Labor from certifying arrangements concerning certain pending applications for UMTA funds and to enjoin the Secretary of Transportation from funding those projects. This Division provided legal advice to the client agency to enable it to certify arrangements related to the identified projects in a timely manner.

In the area of international affairs, the Division of Labor-Management Laws prepared annual reports on the conventions of the International Labor Organization (ILO) that have been

ratified by the United States, including general reports on Convention No. 53 (Officers' Competency Certificates), Convention No. 55 (Shipowners' Liability for Sick and Injured Seamen), and Convention No. 58 (Minimum Age for Employment at Sea), in addition to a detailed report on Convention No. 74 (Certification of Able Seamen). The Division also drafted an extensive report discussing legislation, regulations, collective bargaining agreements, and judicial decisions, which indicate the extent to which United States law and practice is in conformity with ILO Recommendation No. 155, including all or major portions of seventeen ILO conventions incorporated by reference in the recommendation. These reports regarding ILO conventions and recommendation were prepared to fulfill obligations of the United States as a member of the ILO.

As part of the working group of the Tripartite Advisory Panel on International Labor Standards (TAPILS), the Division continued to provide research and drafting services to study the extent to which United States law and practice is consistent with the requirements of ILO Conventions 29 and 105, with a view to possible ratification by the United States. As an outgrowth of those efforts, the TAPILS working group formally presented its conclusions with regard to the two conventions to the full membership of TAPILS, which unanimously adopted the conclusions and in turn transmitted a report to the President's Committee on the International Labor Organization, stating that there are no obstacles to United States ratification of Convention 105. The Division also provided research, advice, and assistance to the Bureau of International Labor Affairs to plan and review the United States government's implementation of Article 4 of ILO Convention 147 (Minimum Standards in Merchant Ships), recently ratified by the United States.

Research and drafting services were provided by the Division for the Department's legislative proposal authorizing a technical assistance program to aid Poland and Hungary to develop free labor markets and related institutions. The Division in this connection also provided review and various legal services for other portions of the Administration's

initiative to assist the two countries to establish free market economies and extend other aid.

The Division provided extensive legal advice and assistance to the United States Trade Representative in connection with the United States-Canada Free Trade Agreement. In this regard, the Division assisted in the preparation of the Report to Congress regarding the extent of Canadian compliance with the provisions of the Free Trade Agreement. The Division also assisted in resolving various technical issues that had remained open at the conclusion of negotiations but that needed to be concluded prior to implementation of the Agreement. Research, briefing memoranda, and other support services were provided by the Division to assist the Department to carry out its advisory function to the President during the strike of employees of Eastern Air Lines. In this connection, the Division researched and reported on legal issues related to all aspects of the procedures under the Railway Labor Act.

Legislation and Legal Counsel

During fiscal year 1989, the Division of Legislation and Legal Counsel continued to work closely with Department of Labor officials in drafting proposed bills and related background materials, presenting the Department's views on pending legislation, and giving technical assistance to Congressional committees. The Division also performed a wide variety of "house counsel" functions, provided administrative legal services under the Freedom of Information and Privacy Acts, provided representation in connection with the Department's internal labor relations and personnel matters, assisted in the preparation of *Federal Register* documents, and furnished legal services to the Office of the Inspector General and the Bureau of Labor Statistics.

Throughout the year, the Division worked on the preparation and review of numerous statements to be delivered by Labor Department witnesses before Congressional committees. Department officials testified on such important legislative matters as youth employment opportunities, child

care, minimum wages, retirement income policy, immigration, "whistleblower" protection and labor standards. Department officials also provided oversight testimony with respect to the administration of numerous DOL programs.

In addition, more than 150 reports to the Office of Management and Budget and Congressional committees were prepared on a broad spectrum of legislative proposals of interest to the Department. The Department also participated in the development of major pieces of legislation during FY 1989. For instance, on June 29, 1989 the Department transmitted to the Congress a bill drafted by the Division entitled the "Job Training Partnership Act Amendments of 1989". The bill was introduced in the Senate as S. 1300 and in the House as H.R. 2803.

The draft bill would amend the Job Training Partnership Act (JTPA) to improve the targeting of JTPA programs to those facing serious barriers to employment, enhance the quality of services provided, and promote the coordination of human resource programs serving the disadvantaged. The amendments would revise the existing title II program for disadvantaged youth and adults and create two new JTPA programs: the Youth Opportunities Unlimited (YOU) program, which would target areas with high concentrations of poverty and stimulate community-wide action to establish and meet goals for improving opportunities for youth residing in those areas, and the State Linkage and Coordination Program, which would provide incentives to States to establish specific statewide goals for serving the disadvantaged and develop a comprehensive plan to achieve the goals.

The Division also prepared letters and testimony and provided technical assistance to the Congress during Congressional consideration of amendments to the JTPA program. On July 26, 1989 the Senate Labor and Human Resources Committee approved S. 543, the "Job Training and Basic Skills Act of 1989," which incorporated key provisions of the Administration proposal.

On September 18, 1989 the Department transmitted to the Congress a bill drafted by the Division "to amend the

Stewart B. McKinney Homeless Assistance Act to make a technical change." The bill would amend the McKinney act to allow funds appropriated for the job training for the homeless demonstration projects to be available until expended. Under current law, funds for the projects may only be expended during the fiscal year the funds are obligated and the succeeding fiscal year. Unless the amendment is enacted, a significant portion of the funds that were appropriated for fiscal year 1988 would not be available to complete these important demonstrations. During September of 1989, the Division prepared letters and provided technical assistance to the Congress relating to this amendment.

The Division performed a wide variety of non-legislative "house counsel" functions. These functions included the furnishing of advice with respect to the Ethics in Government Act as well as other conflict-of-interest laws, orders and regulations. The Division also provided legal advice on such matters as appropriations laws and the Hatch Act, and consulted with numerous DOL agencies, officials and employees on these matters.

The Division's labor relations counsel staff represented the Department in employment-related litigation brought against the Department by its employees or their exclusive representative in the national office. Most of the regional cases continue to be litigated by the regional offices. However, a few regional cases were also litigated by attorneys in the national office. Cases were litigated before the Federal courts as well as before various administrative tribunals including, but not limited to, the Merits Systems Protection Board, the Federal Labor Relations Authority and the Equal Employment Opportunity Commission. Also, a significant number of cases were litigated before arbitrators. In addition, the Division provided guidance and assistance to the regional offices of the Solicitor, the Office of Labor-Management Relations, the Directorate of Civil Rights, and to the personnel offices throughout the Department.

The Division continued to render general legal advice on questions relating to the Administrative Procedure Act, the Freedom of Information Act (FOIA), the Privacy Act (PA), the

Federal Advisory Committee Act, the Paperwork Reduction Act, the Federal Register Act, and several related laws.

One area of ongoing responsibility in this area was the handling of administrative appeals under the FOIA and PA. During fiscal year 1989, action was completed on over 200 appeals. Our appeal determinations reflected the changing law in this area.

Litigation in the FOIA/PA was also an active area for the Division. Although the number of FOIA cases remained about the same this year, there was an increase in the number of cases filed against the Department under the Privacy Act. As in the past, this increase came principally from claimants under the various workers' compensation statutes administered by the Department who sought to use the Privacy Act to amend their claim files. The Division processed more than 750 subpoenas served upon Departmental officials arising out of private litigation in which the Department is not a party. These cases involved actions in Federal and State courts and in administrative tribunals.

A final area of ongoing activity in the administrative law area was the coordination of services to the Department for its publications in the *Federal Register*. Approximately 60 final rule documents were published during the fiscal year, in addition to numerous proposed rules and other notices. The Division also assisted appropriate Departmental employees regarding new publishing requirements for documents established by the Office of the *Federal Register*, and provided advice on other administrative law issues.

The Division's Inspector General section was especially active in the last year in providing legal advice and assistance to its client in legislative matters. In particular, this section participated in numerous issues involving the scope of the Inspector General's investigative authority. This section also provided advice and litigation support to major JTPA and Pension audit projects being conducted by the Inspector General's Office and participated in a number of training efforts for OIG investigators. This section also handled numerous Inspector General subpoenas and represented investigators when

they have been subpoenaed in civil litigation. This section also provided legal assistance to the Office of Labor Racketeering on a number of major investigative efforts involving benefit plans.

Mine Safety and Health

In the rulemaking area, efforts were directed toward publication of final and proposed rules. Final rules were promulgated on automatic emergency parking brakes at underground coal mines and warning devices for mobile equipment at surface coal mines. Final rules were also issued governing the use of brattice cloth at gassy metal and nonmetal mines. Comprehensive proposed rules were published dealing with air quality at all mines. Proposed revisions to roof control standards were published, addressing the quality of roof bolts and the removal of permanent roof supports in underground coal mines. This proposal follows a remand of the two rules in *United Mine Workers of America (UMWA) v. Dole*, 870 F. 2d 662 (D.C. Cir. 1989). The rules were originally published in January 1989. The court's opinion will vacate the affected sections on February 19, 1990; the sections remain in effect as originally published until that date. A proposed rule governing roof control in underground anthracite mines was also published.

In addition, procedures for petition for modification proceedings under Section 101 (c) of the Federal Mine Safety and Health Act of 1977 and for pattern of violations under Section 104 (e) of the Mine Act were addressed in proposed rules. A proposal addressing the transportation, storage and use of explosive materials at metal and nonmetal mines was published. Also a proposed rule which would allow for an alternative to the use of berms or guardrails under limited circumstances at metal and nonmetal mines was published. An advance notice of proposed rulemaking was published for the reporting of accidents and injuries at all mines.

Significant resources were also committed to the drafting of the final rule on coal mine ventilation and the drafting of the proposed rules on electrical standards for both coal and metal and nonmetal mines. Work is also proceeding on the drafting of a proposed rule addressing hazard communication and on an

advance notice of proposed rulemaking dealing with noise-induced hearing loss at both coal and metal and nonmetal mines. Proposed rules on diesel-powered equipment used in underground coal mines were also drafted, based in large part on recommendations made by an advisory committee appointed by the Secretary of Labor. In the metal and nonmetal area, resources were committed to the development of a final rule addressing radiation at underground mines.

In the legal advice area, the Division assisted in the review of approximately 250 petitions for modification of safety standards and provided advice relative to approximately 130 Freedom of Information and Privacy Act matters.

During the fiscal year, approximately 1,800 new cases were filed with the independent Federal Mine Safety and Health Review Commission (Commission), including 1,416 civil penalty cases assessed under section 110 of the Mine Act, and approximately 350 notices of contest filed by mine operators under section 105 of the Mine Act. While a majority of the cases were handled by the regional offices, the Division continued to handle cases requiring close coordination with the MSHA national office. The Division handled an increased caseload of section 110(c) civil penalty cases filed against individual officers and agents of mine operators. Division trial attorneys also handled trial litigation arising out of petitions for modification of MSHA's standards and all applications for temporary reinstatement of miners discharged for exercising their statutory rights. This year 17 new petitions for modification were referred to the Department's Office of Administrative Law Judges and approximately 41 applications for temporary reinstatements were processed.

During the past year, Division attorneys continued to be involved with litigation arising out of the Wilberg Mine fire. On August 25, 1989, the U.S. Attorney declined prosecution of Emery Mining and its agents for willful violations of the Mine Act. Various motions and discovery requests in the administrative proceedings, which had been stayed pending a decision in the criminal case, continued to be handled during the year in preparation for trial now scheduled to begin in June

1990 In a related matter, Division attorneys were involved in the Department's efforts to resist the attempt by third party litigants to depose MSHA investigators involved in the Wilberg accident investigation while our enforcement actions are pending.

In the petition for modification area, two major cases were litigated and decided by Department of Labor administrative law judges.

In *Southern Ohio Coal Company*, No. 87-MSA-7, the mine operator was granted a petition to use a belt entry as an additional intake air entry and in *Jim Walter Resources*, No. 88-MSA-19, a petition to use high voltage electrical power in longwall mining was granted.

In a District Court action related to a mine explosion which killed 10 miners at Pyro Mining Company's William Station Mine, Division attorneys, on behalf of the Secretary, filed an action against the company to prevent it from violating an enforcement order issued by MSHA. On September 26, 1989, a District Court judge issued a temporary restraining order requiring Pyro Mining Company to allow a designated representative of miners to accompany the MSHA investigation team into the mine to investigate the causes of the mine explosion.

The Division's appellate workload before the Commission and the circuit courts of appeals occupied a substantial portion of the Division's resources. The courts of appeals issued decisions in several major cases during this fiscal year. In *Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989), and *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711 (D.C. Cir. 1989), the courts affirmed Commission decisions and held, in accord with the position consistently advanced by the Secretary, that a mine operator is liable without regard to fault for all violations of mandatory standards occurring in its mine, even if caused by the unforeseeable misconduct of a non-supervisory employee.

In *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51 (D.C. Cir. 1988), the court affirmed the Commission and upheld the Secretary's position that the unwarrantable failure sanctions of

section 104(d) of the Mine Act properly may be invoked for a violation that was abated before an inspector discovers that it occurred. The operator had argued that only violations personally observed by an inspector are subject to section 104(d). In a case involving interpretation of the Mine Act's pay retention provisions for miners transferred due to development of black lung disease, the D.C. Circuit reversed an adverse decision of the Commission, ruling that when the Secretary and the Commission disagree on the interpretation of ambiguous provisions of the Act, the Secretary rather than the Commission is entitled to deference. The court held that the Commission must defer when the Secretary's interpretation is a permissible construction of the Act. *Secretary of Labor on behalf of Bushnell v. Cannelton Industries, Inc.*, 867 F.2d 1432 (1989).

The D.C. Circuit ruled in favor of miners in two cases involving claims of unlawful discharge because of refusals to work in conditions the miners believed were hazardous. In *Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424 (1989), the court affirmed a Commission decision finding discrimination on the facts involved. In *Gilbert v. FMSHRC*, 866 F.2d 1431 (1989), the court reversed an adverse Commission finding. Pending at year's end in the D.C. Circuit is the Secretary's appeal from a Commission decision in which, although it found that a now-defunct company unlawfully discharged a miner, it adversely held that the company's owner was not liable for his own act of discrimination in offering to rehire the miner on unlawful terms, and that a subsequent company was not liable as a successor for the discriminatory discharge. *Secretary of Labor on behalf of Keene v. Mullins*, No. 88-1765. Also pending in the 10th Circuit is a mine operator's appeal of a Commission decision holding that miners have the right to select nonemployees of the operator as their representatives for purposes of accompanying MSHA inspectors on mine inspections. *Utah Power and Light Co. v. Secretary of Labor*, Nos. 88-1655 and 88-1659.

Challenges to MSHA's rulemaking activities were involved in three cases before the D.C. Circuit. In *United Mine Workers of America v. Dole*, 870 F.2d 662 (1989), the court upheld in

most respects the Secretary's new mandatory safety standards concerning roof support in underground coal mines from a union's challenge. Two of the standards were remanded for further rulemaking because the Secretary had not adequately explained how these new standards provided at least the same measure of protection provided by the prior standards they replaced. Still pending at the end of the fiscal year was *Coal Employment Project v. Dole*, No. 88-1708, involving a challenge to that portion of MSHA's civil penalty assessment regulations that provides for assessment of a \$20 penalty in cases where the violation is not serious and is promptly abated. Also pending is a challenge by certain operators to portions of the Secretary's new standards regulating the use of explosives in underground coal mines. *Webster County Coal Corp., et al. v. Department of Labor*, No. 89-1026.

Among cases before the Commission during the fiscal year are several involving the scope of Mine Act jurisdiction over various activities, including coal preparation work performed by electric power generating companies, *Pennsylvania Electric Co.*, No. PENN 88-227, and *Westwood Energy Properties*, No. PENN 88-42-R, and elevator repair activities performed at underground coal mines, *Otis Elevator Co.*, Nos. PENN 86-262 and PENN 87-25-R, all pending for decision following oral argument.

Cases appealed to the Commission this year involving discrimination or other interference with statutory rights of miners or their representatives in violation of section 105(c) of the Mine Act include *Secretary on behalf of Price and Vacha v. Jim Walter Resources*, No. SE 87-128-D, in which the Secretary is defending an administrative law judge's decision holding that the portion of a mine operator's substance abuse program which subjects only miners' safety representatives among the non-management workforce to random drug testing constitutes discrimination under the Mine Act. Also on appeal before the Commission is a case raising the issue of whether miners may select as their representative, for purposes of participating in mine inspections, persons from a labor organization which is not certified as the collective bargaining agent. *Mid-Continent*

Resources, No. WEST 87-88. Decisions are pending in both cases. Also, still pending decision is *Wagner v. Pittston Coal Group, et al.*, No. VA 88-21-D, in which a miner is attempting to assert claims under section 105(c) against MSHA and its employees for alleged interference with his statutory rights.

Significant Commission decisions this year included *Rushton Mining Co.*, 11 FMSHRC 759 (May 1989), holding that attorneys' fees and costs may not be awarded against the Secretary in litigation before the Commission under the Mine Act; *Consolidation Coal Co.*, No. WEVA 87-343 (August 1989), holding that the Secretary had discretion under the Act to cite the owner-operator of a mine, as well as its independent contractor, for violations committed by the independent contractor on mine property; *Western Fuels-Utah, Inc.*, 11 FMSHRC 278 (March 1989), involving required task training of supervisory employees who perform non-supervisory work; and *Tennessee Chemical, Inc.*, 11 FMSHRC 783 (May 1989), concerning the interpretation of an important safety standard related to roof control in underground metal mines. Among other cases pending before the Commission at year's end are *Green River Coal Co.*, No. KENT 88-152, involving the scope of MSHA's authority under the Mine Act to require specific safeguards related to transportation hazards, apart from the rulemaking process; *Cyprus Empire Corp.*, No. WEST 88-250-R, involving interpretation of significant provisions of the Secretary's new standards for roof support in underground coal mines; and *Utah Power and Light Co.*, No. WEST 89-161-R, involving the interpretation of mandatory standards precluding the accumulation of loose coal or other combustible materials in underground coal mines.

Other appellate matters included cases before the Assistant Secretary involving proposed modifications of mandatory safety standards under section 101(c) of the Mine Act. Decisions were issued granting modifications to permit the use of coal conveyor belt entries as intake air courses under controlled circumstances in *Emerald Mines Co.* (No. 83-MSA-17), *Quarto Mining Co.* (No. 83-MSA-15), and *Utah Power and Light Co.* (No. 85-MSA-3). The latter decision has been

appealed to the D.C. Circuit (No. 89-1563). Proposed modifications involving use of intake air in belt entries and involving the use of high-voltage electricity on longwall panels in underground coal mines were appealed to the Assistant Secretary during the fiscal year and remain pending for decision. *Southern Ohio Coal Co.* (No. 87-MSA-9) and *Jim Walter Resources* (No. 88-MSA-19), respectively.

Occupational Safety and Health

The Division of Occupational Safety and Health provided extensive assistance to the Occupational Safety and Health Administration (OSHA) in the area of standards development and promulgation.

In the area of standards development, final rules were issued addressing a large number of safety and health issues. Final rules were issued for powered platforms, hazardous waste operations, control of hazardous energy sources (lockout/tagout), lead, asbestos short-term exposure limit, air contaminants, reporting and recordkeeping requirements, and underground construction.

In the final rule for air contaminants, OSHA reviewed health, risk and feasibility evidence for over 400 substances for which changes to the permissible exposure limit (PEL) were considered. In each instance where a revised or new PEL was adopted, OSHA determined that the new limit substantially reduced a significant risk of material health impairment among American workers, and that the new limits were technologically and economically feasible. The revised standards will provide additional occupational health protection to 4.5 million workers.

In another far-reaching rule, OSHA issued health and safety requirements to protect employees engaged in hazardous waste operations and emergency response, thereby implementing directives in the Superfund Amendments and Reauthorization Act of 1986. This rule regulates the safety and health of employees involved in cleanup operations at uncontrolled hazardous waste sites being cleaned up under government mandate, in certain hazardous waste treatment, storage and

disposal operations and in emergency response to incidents involving spillage or release of hazardous substances.

OSHA also resolved all but one of the issues pending in the lead standard, finding the standard technologically and economically feasible in eight industries and requesting some additional time to conclude its evaluation for the nonferrous foundry industry.

In addition, by issuing a short-term exposure limit for asbestos, OSHA concluded its review of one of the most important issues remanded by the court of appeals when it upheld the asbestos standard.

In the safety area, the final rule on control of hazardous energy sources (lockout/tagout) was promulgated. This final rule requires that employers establish and implement procedures for deenergizing and locking or tagging out machinery and equipment during servicing and maintenance, in order to protect employees from the hazards of unexpected activation of the equipment or the release of stored or residual energy in the equipment. OSHA estimates that this final rule will prevent over 100 fatalities and thousands of lost workday injuries per year throughout general industry. This rulemaking, which included public hearings in Washington, DC, and Houston, TX, received considerable attention in the press. The final rule, which requires the use of lockout for equipment which is capable of being locked, is considerably stronger than the original OSHA proposal, which would have allowed employers to use either lockout or tagout as part of their energy control procedures. Another important final rule, which was issued after many years of development, revised OSHA's standards covering underground construction operations (tunnels and shafts). In addition to updating and streamlining the existing standards, this final rule provides improved coverage of tunnel construction operations which might encounter underground deposits of flammable gases such as methane. Final rules were also issued for the safe use of powered platforms used for building maintenance, updating the current rules to address modern building designs and alternative means of stabilizing powered platforms for use with these designs.

All of these final rules, which represent a very substantial output for OSHA, were developed with significant input from the Office of the Solicitor.

In addition to promulgating these final rules, OSHA issued numerous standards proposals and was in the process of developing an even larger number of proposals. Included among these were proposed standards on bloodborne pathogens, 4,4 methylenedianiline (MDA), methods of compliance, hazard communication, confined spaces, electric power generation, transmission and distribution, logging operations, and personal protective equipment (eye, head, face, and foot protection) for general industry, and proposed revisions of OSHA's shipyard standards for hazardous atmospheres, welding, fall protection, personal protective equipment, scaffolds, and access/egress. Public hearings were held on OSHA's proposed standard on concrete lift-slab construction.

The proposed rule for occupational exposure to Hepatitis B Virus (HBV), Human Immunodeficiency Virus (HIV) and other bloodborne diseases received considerable attention. In response to the proposal, 1,284 comments were received and over 150 interested parties had indicated their intent to participate in the informal hearings to be held in Washington, DC; Chicago, San Francisco, New York and Miami.

Hearings were also held on the proposed amendments to the Hazard Communication Standard (HCS). The agency also approved several applications for laboratory accreditation. MET Electric, ETL Testing Laboratories and Dash, Straus and Goodhue met the requirements of 29 CFR 1910.7. As "nationally recognized testing laboratories," they will be able to test and certify certain equipment or materials. This recognition is limited to equipment or materials which, under 29 CFR Part 1910, require testing, listing, labeling, approval, acceptance or certification by a nationally recognized testing laboratory.

The Division and SOL regional offices provided significant support for OSHA's vigorous investigations into the safety and health and recordkeeping practices of a number of major corporations, which resulted in the imposition of record-setting penalties. Although OSHA discovered substantial under-

reporting of occupational injuries and illness in several large corporations, the agency shifted its major case enforcement emphasis away from recordkeeping to major safety and health issues such as cumulative trauma disorders, lead exposure, and construction. Substantial assistance was provided in pre-citation review of the findings, as well as in pretrial preparation of the cases. The Division has been heavily involved in providing legal advice to the client (OSHA) and assistance to the regional offices in recordkeeping and other egregious cases which are of particular importance to the Department, for example, the L'Ambiance Plaza building collapse in Bridgeport, CT, the Milwaukee Deep Tunnel Project explosion, the Friction Products, asbestos imminent danger litigation and the massive USX Corporation citations. Favorable settlements were obtained in the *IBP, Inc.*, *Bath Iron Works*, *International Paper*, *Lockheed Corp.*, and *Hillshire Farms/Sara Lee Corp.* cases, made possible in large part by litigation preparation coordinated by attorneys in this Division. The total dollar value of penalties collected pursuant to these settlements was over \$6.1 million during FY 89. OSHA's expansion of its "egregious willful" policy from recordkeeping to substantive safety and health areas has brought with it new sets of problems requiring the extensive involvement of the Division. Eighteen major safety and health cases were issued in FY 1989. Although these cases are tried at the regional level, this Division has participated actively in the pre-citation review process and the formal settlement process of such egregious health and safety cases. At present, there are approximately four recordkeeping and other egregious cases in various stages of readiness within OSHA. Once they are filed, attorneys from this Division will assist the regional offices in preparing them for trial. As the egregious program has expanded, five of these cases have been tried before OSHRC administrative law judges. All three cases are now pending review and will be handled by this office.

In fiscal year 1989, the courts issued a number of significant decisions affecting OSHA rulemaking. The Fifth Circuit rejected numerous industry and union challenges to the grain handling standard, although it did remand to the agency

for reconsideration on two issues, including the cost of the standard's priority area housekeeping provision. *National Grain and Feed Association v. OSHA*, 866 F.2d 717 (5th Cir. 1989). The District of Columbia Circuit rejected a number of union arguments for add-on measures to the formaldehyde standard, as well as union claims that the only reasonable interpretation of the formaldehyde rulemaking record requires a lower permissible exposure limit than that selected by OSHA. *International Union, UAW v. Pendergrass*, 878 F.2d 389 (D.C. Cir. 1989). The court did, however, ask the agency for a fuller explanation of its cancer risk assessment and its decision not to require medical removal protection.

Several significant court challenges to OSHA rulemaking activity were initiated but not concluded in fiscal year 1989. Twenty-nine industry and union petitioners challenged OSHA's air contaminants standard, which sets exposure limits for 428 separate substances. *Courtaulds Fibers, Inc. v. OSHA*, (11th Cir. No. 89-7073 *et al.*). All 29 petitions were consolidated for review in the Eleventh Circuit, and a special OSH Division-SASCL team was assembled to defend the standard. By conclusion of the 1989 fiscal year, 15 of the petitions had either been settled or dismissed and the government had filed suggestions for a briefing schedule structured to provide for the 30-plus intervenors, as well as petitioners in the case.

The AFL-CIO and Building and Construction Trades Department, AFL-CIO-CLC, returned to the District of Columbia Circuit seeking a court-imposed deadline for OSHA compliance with a 1988 decision that affirmed OSHA's asbestos standard in most respects but remanded for further action on some issues. *Building and Construction Trades Dept. AFL-CIO-CLC v. Brock*, 838 F.2d 1258 (D.C. Cir. 1988). OSHA opposed a court-ordered deadline on the ground that the agency's own schedule for resolving the remand issues is reasonable. The court had not yet decided the case by close of FY 1989.

The International Chemical Workers Union and Public Citizen Health Research Group filed a petition for a writ of mandamus to compel OSHA to publish a proposed cadmium rule within 30 days and a final rule one year thereafter. *In re*

International Chemical Workers Union, D.C. Cir. No. 89-1357. The case was set for oral argument on October 13, 1989.

In June 1989 OSHA announced its feasibility findings for nine lead industries covered by the remand order in *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980). The United Auto Workers and the United Steelworkers challenged OSHA's finding that compliance with a 50 ug/m³ exposure limit solely with engineering and work practice controls is economically infeasible for the nonferrous foundry industry. These and other issues pertaining to the lead remand are pending before the District of Columbia Circuit and will carry over into fiscal year 1990.

Other continuing litigation in the D.C. Circuit relates to OSHA's regulation of nonasbestiform actinolite, anthophyllite, and tremolite. *R.T. Vanderbilt v. OSHA* (D.C. Cir. No. 86-1415) and related cases. The court rejected industry requests for immediate briefing on industry challenges to OSHA's 1986 regulation of nonasbestiform asbestos. OSHA had agreed, at industry request, to reconsider its 1986 standards as they apply to nonasbestiform minerals. In light of the agency's pending reconsideration, the court concluded that the 1986 standards are not final as to nonasbestiform minerals.

In the enforcement area, the courts decided several cases of particular importance. *General Carbon Co. v. OSHRC*, 860 F.2d 419 (D.C. Cir. 1988), was the first enforcement case under OSHA's generic Hazard Communication Standard to reach a court of appeals. In an extremely favorable decision, the court adopted completely OSHA's position that the standard requires labeling based on the intrinsic properties of hazardous chemicals, not on predictions about the levels of risk likely to be experienced by particular employees. *McLaughlin v. Union Oil Co.*, 869 F.2d 1039 (7th Cir. 1989), involved citations issued following a 1984 explosion and fire at a Union Oil refinery that killed 17 employees. Partially reversing the ALJ, the court held that the company's failure to inspect its pressure vessel adequately, to provide its employees with sufficient training and protective equipment, and to have an appropriate emergency plan had all violated the OSH Act and safety standards.

promulgated under it. In action unprecedented in OSHA appellate enforcement, the court also sanctioned Union Oil for what it characterized as a dishonest presentation of a frivolous argument that the ALJ who presided over the case was biased. This case resulted in an award of attorneys fees and costs, in favor of the government, in excess of \$10,000.

The Division obtained an unusual settlement of *Dole v. Collier-Keyworth Co.*, which was the Secretary's appeal of the Commission's potentially far-reaching adverse decision concerning the noise standard. The Division obtained an agreement to compromise the specific issues presented in the original citation and contested by the employer, conditioned upon the submission and granting of a joint motion to vacate all underlying Commission decisions and orders by reason of the settlement. The First Circuit granted the parties' joint motion to dismiss the Secretary's petition to review and remanded the case to the Commission "with instructions to vacate its decisions and orders . . . in accordance with the settlement agreement." As a result, the Secretary was able to avoid the troubling problems presented by the Commission's decision for the general enforcement of the noise standard and to obtain Collier-Keyworth's agreement to comply in the future.

The Division continued to develop favorable case law under the Surface Transportation Assistance Act (STAA). In *Lewis Grocer Co. v. Holloway*, 874 F.2d 1008 (5th Cir. 1989), the Fifth Circuit affirmed the Secretary's finding that a truck driver was discharged in violation of STAA's whistleblower provision after he refused to operate a vehicle he reasonably feared was unsafe.

The courts of appeals also issued several important decisions concerning OSHA's inspection authority. The Eleventh Circuit Court of Appeals affirmed two district court decisions that held Trinity Industries in civil contempt for refusing to honor OSHA inspection warrants and, in one case, imposed a penalty of \$10,000 a day and awarded attorney fees to the government. *United States v. Trinity Industries*, 876 F.2d 1485 (11th Cir. 1989). In another case also involving Trinity Industries, the Eleventh Circuit held that a district court's

finding that there was not sufficient basis for quashing OSHA administrative subpoenas was "amply supported by the evidence." *Dole v. Trinity Industries, Inc.*, 881 F.2d 1086 (11th Cir. 1989)(Table). In addition, the Ninth Circuit also affirmed a district court order holding an employer in criminal contempt for refusing to comply with an OSHA inspection warrant. *Department of Labor v. Hern Iron Works*, 881 F.2d 722 (9th Cir. 1989).

During the short time in fiscal year 1989 that the Occupational Safety and Health Review Commission had a quorum, it decided a number of cases, most of which were reaffirmations of prior Commission precedents. For example, the Commission has again stated that an economic realities test applies in determining the existence of an employer/employee relationship (*Van Buren-Madawaska Corp.*, No. 87-214), that resort to an industry practice test is appropriate only when necessary to cure vagueness in a standard (*Cleveland Electric Illuminating*, No. 84-593), and that reasonable diligence requires that employers determine the magnitude of potential health hazards by using available test procedures (*Continental Electric Co.*, No. 83-921). The Commission also overruled its prior law so as to conform to court decisions holding that the medical removal protection provisions of the lead standard are violated by the failure to pay overtime and other premium pay to employees removed because of blood lead levels. The two commissioners, however, were unable to agree whether the Commission has the authority to order the payment of back wages to employees.

A guilty plea by the president of a trenching company led to a sentence of six months imprisonment, 45 days of which must be served, probation for three years with a prohibition against engaging in trenching work, and an order for monetary restitution to the widow of the deceased employee. This is the second time that a sentence under the criminal provisions of the OSH Act has called for confinement of an individual. Several other cases which were referred to the Department of Justice for possible prosecution remain under active consideration.

Attorneys in the Division are continuing to advise

OSHA's Office of Federal Agency Programs regarding its responsibilities under section 19 of the OSH Act and Executive Order 12196, and implementing regulations. For example, in FY 1989, the Section provided opinions on such matters as OSHA's authority to include violations of 29 CFR Part 1960 in a Notice of Unsafe or Unhealthful Working Conditions issued to a Federal agency pursuant to an OSHA inspection. The Section also provided advice on legal processes to gain entry to the United States Military Academy at West Point, NY. Additionally, the Section continued to provide advice regarding the status of federal prisoners as "employees" and the application of the Hazard Communication Standard in the Federal sector.

Attorneys in the Division also provided assistance and advice to OSHA in a variety of Freedom of Information Act matters. Additionally, the Section reviewed an OSHA revision of its handbook on employee rights.

The Division continued to review proposed legislation and the responses of the different agencies to the proposals. The Section provided the client with legal advice and assistance regarding important appearances before several Congressional committees. For example, the Division assisted the client on testimony dealing with subjects as broad as OSHA oversight and as specific as its testimony on the aerospace industry as well as that on workplace hazards faced by the nation's fire fighters. The Division also assisted in the preparation of testimony regarding Federal action with respect to diesel fuel fumes on the job.

The Division continued to work on two pieces of important legislation which it dealt with last year: that is, the high-risk employee notification proposal and whistleblower legislation.

Under recently enacted anti-drug abuse legislation, the Department of Labor was given funds to set up a grant program to assist employees regarding workplace drug abuse. The Division assisted both the Department and OSHA in their initial steps toward implementing the program through the existing OSHA grant program structure and procedures.

The Division also assisted the Department of Energy in setting up that agency's new civil fine procedures for possible sanctions by DOE against its contractors who operate DOE-owned atomic and nuclear weapons' production facilities. Recent legislation authorized DOE to assess such civil fines in the case of violations of occupational safety and health standards promulgated and enforced by DOE.

The Division continued to assist the Regional Solicitors with respect to bankruptcy filings. We alerted the Associate Regional Solicitor in Fort Lauderdale and the Regional Solicitor in Chicago about the Eastern Airlines bankruptcy-filing in New York. The Division also assisted the Regional Solicitor in San Francisco by preparing a memorandum in the case of OSHA's refusal to refund an OSHA penalty (as a preference) to the trustee in the bankruptcy case of an employer in that region. The Section also produced a Memorandum of Law concerning the application of the automatic stay provision of the Bankruptcy Code to OSHA penalty collection cases. Additionally, the Division is assisting in the development of a Memorandum of Understanding with the Environmental Protection Agency concerning working conditions on construction sites of EPA-funded waste water treatment plants.

The Division's attorneys prepared to represent the Department in *Unarco Commercial Products v. Saulter, et al.*, Civ. No. 89-657 (U.S.D.C.-W.D.Okla.), the first federal lawsuit challenging OSHA's operation of the on-site consultation program under 29 CFR Part 1908. The Division's attorneys are also involved in discussions with attorneys for the State of North Carolina regarding Federal funding of that State's approved State Plan.

In response to a Departmental request for expedited OSHA development of a standard addressing motor vehicle hazards, the Division prepared a study of existing Federal legal requirements pertaining to motor carrier safety, and a legal memorandum addressing the legal restraints imposed on OSHA by section 4(b)(1) of the Act in this area. The Division thereafter redrafted OSHA's proposed vehicle standard to avoid problems of overlapping agency jurisdiction and to minimize the

preemptive effect of a Federal standard from state seat belt laws.

The Division continued its work assisting OSHA in adapting its enforcement program to changing conditions in California. Division attorneys assisted the agency in preparing documents reestablishing Cal-OSHA as the predominant workplace safety agency, in response to a statewide referendum which required the state government to reinstitute the California State Plan.

The Division also conducted a briefing of high-ranking Soviet foreign ministry officials on the subject of OSHA, and provided legal support to OSHA in its ongoing efforts to enforce occupational safety and health standards for the protection of oil-spill cleanup workers in Alaska.

Plan Benefits Security

The Division received several favorable court decisions in its ERISA fiduciary litigation during the fiscal year.

On October 19, 1988, the District Court for the Northern District of Illinois granted the Secretary's motion in *McLaughlin v. Robert Caldwell, et al.*, No. 87-C-4699 (N.D. Ill.), for entry of an order against defendant William B. Goodstein. The order requires defendant Goodstein to make restitution to the DuPage Boiler Works, Inc. Amended Profit Sharing Plan (the "Plan") in the amount of \$1,022,659 in order to restore the principal, plus lost interest thereon, of amounts he caused to be withdrawn from the Plan for his personal use (and that of co-defendant Caldwell). We continue to press the Secretary's claim against defendant Caldwell, who had been a fugitive from justice until his recent apprehension by the FBI.

In *McLaughlin v. Rowley*, 698 F. Supp. 1333 (N.D. Tex. 1988), the Court entered a judgment on October 25, 1988, ordering the trustees of the Rowley United Pension Plan and a high level officer of the sponsoring employer to pay the Plan \$635,588 in restitution for their breach of their fiduciary duties to the Plan in pricing and managing loans of Plan assets to Plan participants. The court found that the trustees failed to act prudently, as required by §404(a)(1)(B) of ERISA, by (1) failing

to require evidence of the borrower's ability to repay the loans without resort to the security; (2) failing to charge fair market rates of interest; (3) failing to enter into written loan agreements setting forth all relevant terms of the loans; and (4) failing to require the repayment of the loans when due, or to appropriately renegotiate the terms of the loans when due. The court further held that the Texas usury ceiling of 10 percent was preempted by ERISA.

On July 14, 1989, the Secretary obtained partial summary judgment in *Dole v. Lundberg*, No. CA3-2471-D, against trustees of the pension plans of Lundberg Industries, of Dallas, TX. The suit, filed on October 4, 1988, together with a companion case filed by the Pension Benefit Guaranty Corporation, alleged that the defendants had caused the plans to make approximately \$4 million in prohibited loans for the benefit of the company. Summary judgment was obtained with respect to approximately \$2.5 million of the loans. Litigation continues with respect to the other substantive claims in the complaint, and with respect to the losses incurred by the plans.

A large number of other cases were resolved by consent decrees.

In *McLaughlin v. Vogel Van & Storage, Inc. et al.*, CA-88-1013 (N.D.N.Y.), we secured a consent judgment on October 1, 1988, against the plan sponsor of the Vogel Van & Storage Inc. Profit Sharing Plan and two trustees ordering repayment of \$147,500 in losses resulting from prohibited loans to the company. The Court also ordered the trustees removed from their fiduciary positions and permanently enjoined them from being fiduciaries to ERISA covered plans in the future.

On October 18, 1988, *McLaughlin v. Ligurotis, et al.*, No. 88-C-8871 (N.D. Ill.) was successfully concluded by the entry of a consent order. In this action, commenced contemporaneously with the filing of the consent order, the Secretary alleged that the trustees of Local 705 IBT Pension Fund and Welfare Fund violated sections 406(a)(1)(C) and (D) of ERISA by appointing and thereafter compensating Ligurotis as the administrator of the two Funds at a time when he was also employed by and receiving full-time compensation from the sponsoring Local.

The complaint further alleged that the trustees of the Pension Fund violated §404(a)(1)(A) and (B) by transferring Fund assets to pay unnecessary and unreasonable expenses in connection with annual luncheons for retirees and other invited guests. Under the terms of the consent order, the trustees agreed, among other things, to restore to the Funds the full amount of the compensation paid to Ligurotis (\$120,000).

On November 8, 1988, the Court signed a consent order in *McLaughlin v. Dawson, et al.*, Civ. No. 86-2536 (D. Md.), that permanently enjoins Glen E. Dawson and Chesapeake Pension Consultants, Inc., from providing any services to ERISA-covered plans, and that requires defendants to pay \$70,000 in restitution to the affected plans. The Secretary alleged in her complaint that from 1980 to 1987 defendants engaged in numerous and repeated violations of §§404 and 406 of ERISA while they were administrators or trustees of approximately 150-200 employee benefit plans. Those violations include the receipt of commissions from third parties in connection with the investment of plan assets, the investment of assets in entities in which defendants had an interest, imprudent investment of plan assets in nonexistent mortgages, and unauthorized use of facsimile signatures of an enrolled actuary on Form 5500's filed with the IRS.

In *McLaughlin v. Peoples Bank and Trust Company of Waterloo, Iowa et al.*, C.A. No. C88-2088 (N.D.Iowa), suit was filed on November 18, 1988, against institutional trustee Peoples Bank, several of its officers, and a large number of plan sponsors, alleging that Peoples purchased stock of its holding company, Peoples Bankshares, Ltd., for plans it trusteeed, for amounts in excess of the stock's fair market value. The complaint also alleged that such stock was exchanged without consideration for certificates of participation in a voting trust controlled by Rowland K. Sverdahl, the Peoples Bankshares Ltd. CEO. Pursuant to a contemporaneously entered Consent Decree and Agreed Order, the plans received \$630,000 representing principal and interest lost. Additional injunctive relief is provided against all settling defendants. The case is still active against Peoples Bank Vice President and principal trust officer,

John Calton, who did not settle.

On December 5, 1988, the United States District Judge for the Northern District of Texas approved and entered a consent decree in *McLaughlin v. Bishop* No. 2-88-0008 (N.D. Texas), under the terms of which approximately \$665,000 out of \$739,000 in excess Plan assets will be distributed to 84 participants. The Secretary's complaint, filed January 8, 1988, alleged that current and former trustees of Producers Retirement Plan Trust violated the provisions of §404(a)(1)(D) of ERISA by failing to distribute excess plan assets to participants on a *pro rata* basis following partial termination of the plan, as required by the trust agreement then in effect. Following the partial termination, the plan's sponsor, Producers Grain Corporation, had amended the trust agreement to provide for recapture by the sponsor of the residual assets.

In *McLaughlin v. Toy National Bank, et al.*, C.A. No. C-86-4084 (N.D. Iowa), on December 30, 1988 and January 3, 1989, agreements and orders signed by nine of the remaining defendants in this case were filed. The Agreements limit the discretion and authority of these defendants to administer employee benefit plans. They also impose safeguards to prevent a recurrence of the particular events that led to the purchase in this case by The Rock Rapids State Bank Profit Sharing Plan of employer securities for less than adequate consideration. Restitution of losses resulting from the purchase has already been obtained from the Toy National Bank, the trustee of the Plan at the time of the alleged violations of ERISA §§404 and 406.

The United States District Court for the District of New Hampshire approved and entered a consent order on January 6, 1989, in *McLaughlin v. French, et al.*, CA-87-309-L (D.N.H.). The order requires the trustees of the Plumbers and Steamfitters Local No. 131 Pension Plan and Trust, their plan administrator and the New Hampshire Savings Bank jointly and severally to restore \$107,000 to the Plumbers Plan; requires the Plumbers Plan to retain an investment manager for a period of 10 years; and orders that an independent fiduciary be retained to certify any other plan investment in certificates of deposit.

The consent order resolved the Department's case against these defendants which alleged that they violated their fiduciary duties in connection with the plan's purchase of a \$1.5 million certificate of deposit from the Bank at a below market rate of interest to facilitate a construction loan to a developer who agreed to use union labor only. The complaint also alleged that the trustees breached their fiduciary duties in connection with a \$1.2 million land acquisition loan at a below market rate of interest between the Plan and a developer who agreed to use union labor only as a condition of the loan.

In *Whitfield v. Cohen*, 682 F. Supp. 188 (S.D.N.Y. 1988), the court approved a consent decree on January 19, 1989. The decree requires defendants Malcolm Cohen and Miller Druck Co. to pay \$475,000 in restitution to the Miller Druck Co. Inc. Employee Stock Ownership Plan (the Plan) for alleged fiduciary violations of ERISA by the defendants in connection with the selection and monitoring of Penvest, Inc., to manage the assets of the Plan. Previously, the Secretary had obtained a judgment against the defendants and in favor of the Plan in the amount of \$534,392 from which the defendants appealed and the Secretary cross-appealed. Under the terms of the consent decree, the appeal and cross-appeal are dismissed and the parties compromised the judgment for \$475,000.

On June 1, 1989, suit was brought in *Dole v. Eastern Air Lines, Inc.*, CA 89-1132 (S.D. Fla.), alleging that Eastern had breached its fiduciary duties under ERISA to the Eastern Air Lines, Inc. Long Term Disability Plan and the Eastern Air Lines, Inc. Travel Accident Plan, two health and welfare funds funded entirely by employee contributions, when it applied commissions generated from insurance policies purchased by the plans toward payment of actuarial and consultant services provided by William M. Mercer-Meidinger-Hansen, Inc. (Mercer) to Eastern and its defined benefit pension plans. The complaint further alleged that Eastern breached its fiduciary duties to the Eastern defined benefit pension plans when those plans paid to Mercer actuarial and other similar or consultant expenses incurred by Eastern which were unrelated to the operation of the Eastern defined benefit pension plans. Finally,

the complaint alleged that Eastern violated ERISA when it compensated itself for administrative services to the Travel Accident Plan when it failed to substantiate the administrative services it provided to that plan. On the same day, a consent decree was entered by the court which: (1) required Eastern to pay approximately \$3 million into the two health and welfare funds and the defined benefit pension plans; (2) required Eastern to retain a third party to conduct audits of the two health and welfare plans and the defined benefit pension plans for the next five years to insure compliance with ERISA; and (3) required Eastern to retain a third party to conduct an audit of all other ERISA covered plans maintained by Eastern to determine whether services paid for by such plans were, in fact provided to such plans. The Department also entered into an agreement with Mercer requiring Mercer to establish a compliance unit responsible for establishing a program to provide reasonable assurances against future violations of ERISA.

McLaughlin v. Evans, et al., 88 C 10590 (N.D. Ill. 1988), was filed on December 23, 1988, in response to a referral from the PBGC. A consent decree was entered by Judge H. Leinenweber resolving all issues in the complaint on June 13, 1989. The complaint sought the appointment of an interim receiver to administer the Retail Clerks Union District Council No. 12 Variety and Department Store Pension Fund because the trustees had resigned without arranging for the appointment of successor trustees. The court appointed a receiver on June 13, 1989.

Dole v. Garrett, et al., Civ. Action No. 89-C-295-G (D. Utah), was filed in the U.S. District Court for the District of Utah, Central Division, on March 30, 1989, and resolved by consent decree on August 16, 1989. The complaint alleged that the fiduciaries of the Intermountain Concrete Specialties Employees' Retirement Profit Sharing Plan (the Plan) breached their fiduciary duties imposed by ERISA §404(a)(1)(B) and (C) by causing the Plan to invest approximately \$140,000 (over 50 percent of the market value of its assets) in highly speculative limited partnerships without conducting a prudent inquiry into

the merits of such investments. The consent order requires the defendants to allocate \$45,000 from their plan accounts to those of other participants and to appoint an investment manager to make all plan investment decisions for a period of five years.

On September 5, 1989, a consent order was obtained that resolved the Secretary's complaint, filed on February 17, 1989, against the trustees of the Food and Commercial Workers Health and Welfare Fund as well as Group Dental Service (GDS), a dental service provider to the Fund, and its two principals, Ralph Foxman and Herbert Kushner, alleging imprudence in the selection and monitoring by the trustees of GDS. *Dole v. McNutt, et al.*, (D. Md.). Allegedly, in 1984 and 1986, contracts with GDS were renewed, at higher rates, despite the fact that GDS never provided utilization or other relevant data to the plan to justify the rates charged. These renewals also constituted prohibited transactions involving GDS and its two principals, who were parties in interest with respect to the Fund. GDS, Kushner and Foxman were also alleged to have knowingly participated in the trustees breaches. The consent order requires a reformation of the Fund's contracting and service monitoring practices.

During the fiscal year, a number of new cases were filed to enforce ERISA's fiduciary responsibility provisions. On October 14, 1988, the Department filed suit against five individual trustees of the International Brotherhood of Electrical Workers Union Local 98 Pension Plan in Philadelphia, PA, alleging breaches of ERISA §§404, 405 and 406 in connection with a pre-ERISA mortgage loan made by the Plan to the Electrical Mechanics Association (EMA), a not-for-profit corporation controlled by Local 98. *McLaughlin v. Compton, et al.*, (E.D. Pa.). The purpose of the loan, which became a prohibited transaction on July 1, 1984, when a statutory transitional exemption expired, was to finance construction of a building to be rented to Local 98. After EMA refused to rescind the loan (when it became prohibited) by repaying the principal balance due thereon, the Plan's trustees caused the Plan to sell the note evidencing the loan back to EMA at its then current market value, which was substantially less than the

unpaid principal balance. The Secretary seeks restitution of the unpaid balance of the loan, with interest, and injunctive relief against all defendants.

On October 25, 1988, a complaint was filed against certain former fiduciaries of the Employees Profit Sharing Plan sponsored by Economy Builders Supply, Inc., a company located in Sandia, Utah. *McLaughlin v. Jones, et al.*, (D. Utah). The complaint alleges that the defendants violated their fiduciary duty of prudence and their obligation to diversify plan investments, as set forth at §§404(a)(1)(B) and (C) of ERISA, by investing 32 percent of the Plan's assets in two real estate limited partnerships. The two partnerships were highly leveraged and were acknowledged to be speculative in nature. The Secretary contends that the partnerships were unsuitable as investments for such a large proportion of the Plan's assets and that the defendants did not prudently investigate the partnerships before committing the Plan to invest in them.

On November 29, 1988, the Department filed an action against the trustees of the National Production Workers Union Insurance Trust Fund. *McLaughlin v. Senese*, No. 88-C-10052 (N.D. Ill.) The complaint alleges that the trustees were imprudent both in the initial selection of the Fund's dental service provider, Consultants and Administrators, as well as in their failure to monitor the value and quality of the services provided. The complaint also alleges that as a result of their having caused the Fund to overpay for dental services, the trustees committed a series of nonexempt prohibited transactions.

McLaughlin v. Carell, et al., No. 3-88-1097 (M.D. Tenn.), was filed on December 23, 1988. The complaint alleges that the trustees of the Southern Council of Industrial Workers (SCIW) Health and Welfare Fund and the SCIW Pension Fund violated ERISA §§404(a)(1)(A) and (B) and 406(a)(1)(C) and (D) by failing to adequately investigate reasonable fees for administrative services before hiring J.W. Carell Administrators and Consultants, Inc. (JWC Inc.) as the administrator for both plans and subsequently paying excessive fees to JWC Inc. The complaint also alleges, among other things, that the trustees

accepted gratuities from JWC Inc. in violation of ERISA §406(b)(3).

On February 3, 1989 the Department filed suit against the current and former fiduciaries of the Fraternity Sportswear Sales Co. Profit Sharing Plan. *Dole v. McClure*, (CA No. C2-89-099, S.D. Ohio). The complaint alleges that the fiduciaries committed acts of imprudence and self dealing in connection with the sale of real property owned by the plan and leased to the plan sponsor. The property was sold on April 1, 1985 to Jack Grace, a former plan fiduciary and former owner of the plan sponsor. The \$90,000 sales price reflected only the value of the land and did not include the \$650,000 net value of a building that the employer had constructed on the property.

The complaint in *Dole v. Tiemann, et al.*, No. C-1-89-150 (S.D. Ohio), filed February 24, 1989, alleges that the trustees of six Cincinnati-based, construction-related Taft-Hartley pension plans violated the provisions of §404(a)(1)(B) of ERISA in connection with a \$3,000,000 short-term residential development loan. The six plans are participants in the Tri-State Investment Foundation, an Ohio unincorporated association whose purpose is to solicit and evaluate applications for loans the proceeds of which will be used in, and thus stimulate, construction activity in the Greater Cincinnati area. The complaint specifically alleges that the trustees, in committing plan assets for those loans, failed to adequately investigate the borrower's credit-worthiness, the economic feasibility of the project, or the borrower's ability to obtain permanent financing. The action seeks restitution of all losses, the appointment of an independent receiver to manage and market properties that had served as loan collateral and acquired by the plans in lieu of foreclosure, and an injunction prohibiting the trustees from making real estate loans in the future without review and supervision by an independent fiduciary.

In *Dole v. Jones et al.*, Civ. No. C-89-96-D (D.C.N.H.), filed on March 2, 1989, the Secretary alleges that the former trustees of the Northern New England Carpenters Pension Plan (the Plan) violated ERISA by approving the expenditure of \$2.7 million in plan assets for the purchase, development and lease-

back of a parcel of real estate as a site for a shopping mall. The lease from the plan to the developer required the use of union labor in the construction of the mall. Among other things, the complaint asserts that the trustees acted imprudently and not for the exclusive purpose of providing benefits in entering into the transaction by failing to (1) obtain a feasibility study, (2) check the credibility of the developer, (3) require adequate lease commitments, (4) assure that all necessary easements and rights had been obtained to assure the success of the project, and (5) obtain a market rate of return on the investment.

The Department filed a complaint in *Dole v. DeltaUS Corp.*, Civ. Act. No. TY-89-165-CA (E.D. Texas) on March 17, 1989. The complaint alleges that in September, 1984, the DeltaUS Corp., an oil and gas drilling business, in fulfillment of its minimum funding obligation to the Retirement Plan for Employees of DeltaUS, contributed nine royalty-producing oil and gas properties valued at \$622,993. The complaint also alleges that First City National Bank of Tyler caused the Plan to accept this contribution. According to the complaint, this transaction constituted a violation of ERISA §406(a)(1)(A), because the Bank had caused the Plan to engage in a transaction which involved a sale or exchange of property between the Plan and a party in interest. The complaint seeks to have DeltaUS rescind the transaction so that the properties are returned to the corporation and to restore the Plan to the financial position it would have been in had the transaction not taken place.

Dole v. Steen, et al., Civ. No. 89-38 (N.D. Iowa), was filed on March 23, 1989. The complaint alleges that the fiduciaries of the Mechanicsville Trust & Savings Bank Employee Stock Ownership Plan (the ESOP) violated ERISA §§404 and 406 by causing the ESOP to purchase a 23 percent interest in the Bank's holding company without evaluating the financial condition of the Bank, which had been deteriorating. Also alleged are ERISA §§404 and 406 violations stemming from the fiduciaries' imprudent decisions to invest ESOP assets in the holding companies of two of the Bank's competitors. An

individual acting as an unauthorized ESOP "administrator" as well as its trustee held offices and ownership interests in each of those holding companies and banks. Also named as defendants are the Bank and its directors, who were appointed and failed to monitor the errant fiduciaries.

On March 27, 1989 the Department filed a complaint in *Dole v. Hansbrough*, CA No. 89-7098 (D.D.C.), alleging that the two trustees of the Dart Drug Stores, Inc. Employees Profit Sharing Plan (the Plan) had violated ERISA fiduciary duties in connection with the 1984 leveraged buyout of the Dart Drug Stores Division of Dart Group by its management. A majority of the \$187 million purchase price was financed by debt obligations but the Plan purchased \$3.5 million of preferred stock in the new company, using funds transferred from the Dart Group Plan. The funds represented the accrued benefits of Dart Group employees who were transferring to the new company. The complaint alleges that the Plan trustees obtained no appraisal of the fair market value of the preferred stock and failed to adequately investigate the merits of the transaction with respect to the Plan. The Department contends that the trustees caused the Plan to pay more than the fair market value of the preferred stock and that the Plan invested in the company on terms less favorable than those received by other investors including the Plan trustees, in violation of ERISA §§404(a)(1)(A) and (B), 406(a)(1)(A) and (D), and 406(b)(1) and (2). The complaint asserts that the new company Dart Drug Stores, Inc., by virtue of having participated in the prohibited transaction committed by the trustees, is also liable for losses incurred by the Plan.

Dole v. Martorelli, No. 89-0658-C-3(E.D. Mo.) was filed on April 11, 1989. Defendants are trustees of three Taft-Hartley benefit plans, the plan administrator, and the sponsoring union (International Union of Operating Engineers Local 513). In count one, the complaint alleges that as fiduciaries of one of the plans--the Vacation Fund--the trustees permitted plan assets to be transferred to Local 513 in satisfaction of members' union dues, in violation of §§404(a)(1)(A) and (D) of ERISA, and further caused the Plan

to engage in a prohibited transaction in violation of §406(a)(1)(D). Additionally, the union trustees are charged with violations of §406(b)(1) and (2). Count two alleges that the trustees violated §406(a)(1)(C) and (D) by retaining and compensating, through reimbursement to Local 513, one of the union trustees and "Fund Collector".

The five-claim complaint in *Dole v. Shearson Lehman Hutton Inc., et al.*, No. 89 CV 547, (N.D.N.Y.), alleges that two brokerage houses, five investment management firms, and ten trustees and the Executive Administrator of three New York State Teamster plans (the New York State Teamsters Conference Pension and Retirement Funds, The Upstate Teamsters Pension and Retirement Fund, and New York State Teamsters Council Health and Hospital Fund) committed numerous violations of ERISA in connection with the Funds' investments. The complaint alleges that brokerage firm Shearson Lehman Hutton, Inc., investment management firm Stein Roe and Farnham, Inc., and their agents misused the Funds' assets to benefit themselves and others through a "stock parking" scheme that allowed them to transfer stocks that decreased in value to the Funds and stocks that increased in value to other customers. Shearson, Stein Roe and their agents are also charged with violations involving indirect fee arrangements with banks in connection with the Funds' purchases of certificates of deposit. Shearson and four of the Funds' investment managers are alleged to have mishandled the Funds' cash balances and Shearson, along with its employee George Inserra, is alleged to have manipulated the Funds' stock purchases for the benefit of other customers. The Funds' trustees, Executive Administrator, and investment managers are charged with allowing the payment of excessive commissions to Shearson and another brokerage company, First Albany Corporation, by failing to monitor the compensation paid to the brokerage companies and their employees. The complaint seeks a court order requiring, among other things, the defendants to restore, with interest, all losses to the Funds, and to return profits they made to the Funds.

In *Dole v. Guido, et al.*, the Secretary filed suit against trustees of four employee benefit plans in New York City

sponsored by the International Longshoremen's Association (ILA) and the Metropolitan Marine Maintenance Contractors Association (MMMCA). The case involves failure by the trustees over a period of many years to collect delinquent employer contributions. Many of the companies with the largest delinquencies were owned by individuals who are or were on the plans' boards of trustees. The lawsuit seeks the appointment of an independent fiduciary to collect contributions owing to the plan from those companies which are currently able to pay. It also seeks restitution from those trustees for all sums which could have been collected previously but which are now uncollectible due to the insolvency of the employers.

There was significant ERISA litigation activity during the fiscal year in the regional offices as well.

In the Atlanta region, *Dole v. Southern Bell Telephone and Telegraph Co.*, CC89-0226-M (W.D.N.C.) was filed on May 23, 1989. This case presents issues of whether defendant violated the sole purpose, prudence and plan document provisions of ERISA by refusing to pay termination pay to a group of 21 employees who took early retirement after contracting with defendant to accept early retirement in exchange for about \$23,000 each in special termination bonuses. In *Dole v. Key Trust Company of Florida, N.A.*, 89-383-CIV-ORL-19 (M.D. Fla.), filed on May 9, 1989, a consent judgment was entered on May 11, 1989, in which the defendant agreed to reimburse 27 employee benefit plans in the amount of \$1,601,353 by repurchasing their interests in a mortgage now in default on undeveloped beach front property. The judgment provided that the plans would continue to hold the right of participation in any profit to the bank resulting from the sale of the property. The defendant as a fiduciary, had allegedly imprudently invested the plans' funds in the mortgage in order to complete a sale in which the defendant had a financial interest, thereby engaging in a prohibited transaction. Defendant was also enjoined from future violations of Title I of ERISA.

In *In re: Dudley Trucking Company, Inc.*, 86-02103-HR, Adversary No. 87-0284A (N.D. Ga.) the bankruptcy trustee of a bankrupt corporation in an adversary proceeding attempted to

force the participants and beneficiaries of a profit sharing plan to come forward and prove their claims to plan assets or risk losing them to the bankruptcy estate for distribution to the bankrupt's general creditors. The Secretary of Labor was named as a defendant, along with plan participants and the IRS. We filed a Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter. On April 13, 1989, the bankruptcy court granted a Motion for Summary Judgment filed by another defendant in the adversary proceeding holding that the bankruptcy court had no jurisdiction to grant the relief sought by the trustee. The trustee was ordered to abandon the Plan assets to the Plan trustee. Since the relief sought by the Secretary was thereby obtained, the Secretary's motion was declared moot.

In *Dole v. Peter Patraha, et al.*, 88-6940-CIV-JCP (S.D. Fla.), the complaint was filed on December 6, 1988, and a consent judgment was entered on March 9, 1989, in which the fiduciaries of a profit sharing plan are enjoined from future ERISA violations and are ordered to restore to the Plan \$800,913 in restitution. Of this amount \$256,571 will be paid within three months for distribution to the accounts of participants and beneficiaries not related to defendants. The remainder of the restitution is contingent upon receipt of proceeds in a private lawsuit, and will be distributed to the accounts of participants related to defendants. The violations resulted from five inadequately secured prohibited transaction loans from the Plan to defendants and fiduciary violations in connection with administration of the loans.

In the Boston region, a complaint was filed against the coordinator, administrator, and eight trustees of the Metal Trades Council Health Benefit Plan in *Dole v. Johnston et al.*, Civ. No. C-89-2-D (D. N.H. 1989), alleging fiduciary breaches and self dealing with plan assets which resulted in unpaid medical and dental benefits totalling \$450,000. The principal defendant is the plan coordinator who is charged with commingling plan money with his own accounts; failing to deposit plan money into the plan account; adding unauthorized charges to premiums billed to participants; and failing to

account for these additional monies to plan officials. The trustees are charged with fiduciary breaches due to their failure to monitor the activities of the plan coordinator and plan administrator. *Dole v. Rosen, et al.*, Civ. Action No. B-89-238 (WWE) (D. Conn.), filed on April 26, 1989, involves ERISA §§404 and 406 violations by the trustee and plan administrator of the Daron Industries Retirement Plan. Also named as defendants are two corporate parties in interest who knowingly participated and profited from the fiduciary breaches of their co-defendants. The major violations concern party in interest loans, self dealing in Plan assets, and a failure to diversify plan investments so as to minimize the risk of large losses. The Plan sponsor has been out of business since 1984 and the Plan has been operating as a wasting trust with approximately 83 percent of its assets currently tied up in three mortgages on real property located within the same geographical area. Our suit seeks the correction of the diversification problem by sale of the mortgage notes together with the recovery of losses resulting from the prohibited loans. In *Dole v. Etscovitz et al.*, Civ. No. 89-0229-B (D. Maine), we filed a complaint in intervention in a private suit (*Casco National Bank v. Etscovitz*) in order to protect the Etscovitz Company Pension Plan's rights to the proceeds of a certificate of deposit the trustee pledged as security for a bank loan to the plan sponsor. Our complaint alleges fiduciary breaches and prohibited transactions by the Trustee in which the Bank knowingly participated. We seek the recovery of approximately \$175,000. In *Dole v. Dante, et al.*, CA-H-89-122 (EBB)(D. Conn), on March 17, 1989, a judgment was entered against the trustees of the Richard Roberts Realty Corp., Employee Stock Ownership Plan enjoining them from future violations of ERISA and ordering them to restore \$1,413,837 to the plan caused by their failure to diversify plan assets so as to minimize the risk of large losses. The violations resulted from the plan's investment in nonqualifying employer securities of two real estate holding companies located in the same geographical area. The court order requires the trustees to sell the stock to the Richard Roberts Group of Avon, CT, at a price equal to the stock's original contribution value plus

interest at the IRC rate. This price is greater than the current fair market value of the stock (not publicly traded) and provides a greater return for the plan participants and beneficiaries.

Dole v. Robidoux et al., Civil Action No. 87-660 (EBB) C. Conn. (6-30-89) involved the improper expenditure of \$1.51 million in Teamsters health fund assets, by the long-time plan trustee and Secretary/Treasurer of Local 671, to build a new union hall. The case was consolidated with two other related actions and referred to Senior U. S. District Judge Zampano for potential mediated settlement. After full briefing of the issues, the case was tried before a 3-member Mediation Panel from April 4-7, 1989. Thereafter, the Panel met with the parties and recommended a settlement which mirrored the Department's proposal: \$1.8 million in restitution, a permanent injunction against defendant Robidoux from ever serving as an ERISA fiduciary, and a three-year bar against the other plan trustees. All defendants agreed to these terms, and a consent judgment was entered on June 30, 1989.

On November 19, 1988, a consent judgment in *McLaughlin v. Tolkow et al.*, CA-85-1276(JMcL) (E.D.N.Y.) was entered against 24 of 25 defendants removing all but three of the trustees from serving as fiduciaries to the United Welfare Fund and permanently barring them from serving as fiduciaries to any employee benefit plan affiliated with Amalgamated Local Union 355. The remaining trustees are permanently enjoined from violating ERISA in the future. In addition, the breaching fiduciaries shall reimburse the fund a total of \$573,700. Further, the current trustees have agreed to engage an independent consultant to conduct an overall study of the administration and efficiency of fund operations and employ a second independent consultant to study and make recommendations concerning the reasonableness of administrative expenses in connection with fund activity. On April 14, 1989, the remaining defendant consented to a judgment removing him from the plan, enjoining him from future violations, and ordering him to reimburse the plan \$39,000 he had received in excess administrative fees. The principal violations alleged related to payments to union

business agents reimbursing them for work allegedly performed for the Fund which could not be adequately documented.

In *McLaughlin v. Ardito*, 10 E.B.C. 1279 (Bankr. E.D.N.Y. 1988) 1988 Bankr. LEXIS 2273 U. S. Bankruptcy Court, E.D.N.Y. (10-20-88) Adversary Proceeding 8-88-0050-20, the Department received a favorable decision (10 EBC 1279) from the bankruptcy court in the Eastern District of New York granting a motion for summary judgment in connection with an adversary complaint filed against the debtor to prevent the discharge of a \$707,000 debt owed the company pension plan. The debt is based on a judgment obtained against Ardito back in 1987. The bankruptcy court found the debt to be non-dischargeable because it arose from a defalcation committed by Ardito while acting in a fiduciary capacity. Bankruptcy Code section 523(a)(4) provides an exception to discharge of the debt if such facts are proved. The court defined the term defalcation to be broader than fraud, embezzlement or misappropriation and stated that neither malicious intent nor bad faith need be shown. This may be the first decision on the question of defalcation in an ERISA context.

McLaughlin v. Sheffield Tube Corp. et al, Civ. No. H-88-707 (PCD) (D. Ct. 1988) involves alleged violations of ERISA by virtue of the failure of the corporate sponsor and its principal officer/stockholder to recognize ERISA's applicability to an "informal" pension plan. The complaint seeks an order requiring defendants to pay eligible participants full benefits. The present value of vested benefits is approximately \$700,000.

Following four years of litigation in *Dole v. Lupo et al.*, CA-85-1713 (LBS) (S.D.N.Y), on April 18, 1989, a settlement was reached providing for entry of a consent judgment and order in this case involving a New York City prepaid legal services plan. The complaint alleged that the plan trustees had failed to adequately monitor the quality and cost-effectiveness of the law firm service provider, resulting in payment of excessive fees. The complaint also alleged that the law firm and its principals had knowingly participated in the trustees' fiduciary breaches, and had misrepresented hours of service provided to plan participants. The order requires the defendants to pay

\$225,000 to the plan, and mandate the law firm's waiver of any claims it may have to over \$370,000 in fees owed by the plan for services provided pursuant to its contractual arrangement. The trustees are also ordered to review, monitor and evaluate the plan's operation on a regular and ongoing basis, and the trustees and law firm principals are permanently enjoined from violation of §§ 404 and 406 of ERISA. Further, the trustees are required to retain, for two years, a consultant who will review the quality and effectiveness of the service provider and an auditor who will review the adequacy and accuracy of the firm's time records. Finally, the trustees, with advice from the consultant, must determine appropriate and reasonable hourly rates for legal services provided, and may not pay the law firm more (although pursuant to a per capita system, they may pay less) than those hourly rates multiplied by the number of hours of service actually provided by the firm. This last provision is particularly significant since the defendants had argued that a flat per capita system which failed to consider hours of utilization did not violate ERISA's prudence requirements.

In the San Francisco region, *Brock v. Simon*, CV 86-1605-RMT (C.D. Calif.) was resolved. Defendants, Mr. and Mrs. Simon, were owners of the plan sponsor and trustees of the company's pension plan. The plan was terminated with excess assets (over the amount necessary to pay all vested common law employees/participants) of \$892,285. While \$692,826 belong to Mr. Simon, IRS regulations restricted his share to \$60,000. The plan appeared to proscribe a reversion to the company. However, after termination, the plan was retroactively amended to allow the reversion and the money in question went to the company. We sued alleging the retroactive amendment was null and void and the reversion was illegal. The Court denied our plea, holding that the retroactive amendment was proper or, alternatively, finding that the plan implicitly provided for a reversion.

The defendant in *Dole v. Vanourek*, C-89-111-AAM (E.D. Wash.), the trustee of Soils and Crop Services, Inc., Profit Sharing Plan (and Pension Plan), was indicted and convicted of theft from the Plans and thus became ineligible to serve as a

trustee; however, he refused to appoint a successor. A default judgment was obtained appointing a new trustee for the Profit Sharing Plan and requiring the defendant to turn over all books, records and monies to the new trustee. (PBGC obtained similar relief as to the Pension Plan.)

In areas other than litigation, the Division participated in several important regulatory projects, under both ERISA and the Federal Employees Retirement Security Act (FERSA).

During the fiscal year, regulations were proposed for public comment, and adopted in final form after consideration of the comments, in order to implement a recent statutory change to section 502(c) of ERISA that requires the Department to assess civil monetary penalties in connection with the failure by a plan administrator to file a complete and accurate annual report on behalf of the plan. The two regulations were proposed on October 17, 1988 (53 FR 40674, 40677), and adopted on June 26, 1989 (54 FR 26890, 26895).

Two regulations were adopted implementing changes in ERISA's annual reporting requirements for employee benefit plans, and in the forms to be used in completing such reports, effective for plan years beginning on or after January 1, 1988. 53 FR 8624, 8631 (March 1, 1989).

Following a public hearing on the matter, as well as submission of comments from interested persons, the Department issued a final rule relating to section 408(b)(1) of ERISA, the statutory exemption from ERISA's prohibited transaction provisions that permits plans to lend money to their participants. 54 FR 30520 (July 20, 1989).

A number of regulatory actions were taken under FERSA as well. These include (1) the adoption of several existing ERISA class exemptions to apply to transactions involving the federal Thrift Savings Plan, 53 FR 52838 (December 29, 1988); (2) the adoption of a final Interim Rule for processing FERSA exemption requests, 53 FR 52688 (December 29, 1988); and (3) the adoption of a final regulation governing procedures for allocation of fiduciary responsibility among fiduciaries of the TSP, 53 FR 52684 (December 29, 1988).

During the fiscal year, the Division also assisted the

Pension and Welfare Benefits Administration in the drafting and publishing of several significant advisory opinions, including four relating to the definition of "Plan Assets" contained in the Department's regulations at 29 CFR §2510.3-101. That regulation sets forth conditions under which a plan's assets will be deemed to include the assets of a second entity, such as a partnership or trust, by reason of the plan's investment in the entity. In the first advisory opinion (No. 89-04A, March 30, 1989), the Department stated that a partnership or trust could qualify as a "venture capital operating company" under the regulation (in which case the assets of the company would not be considered assets of plans that invest in the company). In the second opinion (No. 89-05A, April 5, 1989), the Department concluded that the redemption of a partner's equity investment in a partnership (or an intra-family transfer of such an investment) would constitute an event that requires a redetermination of the partnership's status under the regulation. In Advisory Opinion No. 89-14A (August 2, 1989), the Department stated that a provision in a partnership agreement that is drafted to avoid reclassification of the partnership as a publicly traded partnership under sections 469(k)(2) and 7704(b) of the Internal Revenue Code would ordinarily qualify as restrictions not affecting the "free transferability" of the partnership interests, a significant factor in the regulation. Finally, Advisory Opinion No. 89-15 (August 3, 1989) concluded that an entity would not constitute a "venture capital operating company" for the valuation period prior to the one in which it made its first venture capital investment.

Special Appellate and Supreme Court Litigation

In fiscal year 1989, the Division continued its unique function of providing centralized litigation and review of all Supreme Court matters in which the Department is a party or has an interest, as well as litigation of court of appeals cases especially assigned because of the importance, novelty or difficulty of the legal issues.

During its past term, the Supreme Court largely adopted the Department's views in the cases in which the Secretary

participated. These cases involved the Employee Retirement Income Security Act (ERISA), the Black Lung Benefits Act (BLBA), and the Labor-Management Reporting and Disclosure Act (LMRDA).

In the ERISA area, the Court unanimously agreed with the view, advanced by the Department as *amicus curiae* in *Massachusetts v. Morash*, 109 S. Ct. 1668 (1989), that ERISA does not cover ordinary payments for vacation leave made from an employer's general assets. Therefore, the state is free to enforce a state wage payment statute imposing criminal penalties for nonpayment of promised vacation benefits. And in *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989), the Court held that courts must review under a *de novo* standard of review benefit denials by plans resting on an interpretation of the plan terms, unless the plan itself gives the plan administrator discretion in construing plan terms. The Court also held that plan administrators must provide plan information on request to former employees who make a colorable claim of their entitlement, present or future, to benefits. In these *Firestone* holdings, the Court adopted many of the views the Department expressed in its *amicus* brief.

In the black lung benefits area, the Court handed the Department a mixed decision in *Pittston Coal Corp. v. Sebben*, 109 S. Ct. 414 (1988). It unanimously agreed with the view that the court of appeals had improperly required the Department to reopen the approximately 94,000 black lung benefit claims that had been finally denied before the date on which the court of appeals had, in a prior case, rejected the Department's interpretation of its authority to establish eligibility criteria different from the ones the Social Security Administration had previously used. By a 5-4 margin, however, the Court held that the Department's regulation establishing an interim presumption of total disability due to pneumoconiosis, by requiring at least 10 years of coal mine employment to invoke it, impermissibly imposed more restrictive "criteria" than those permitted by the statute.

In the LMRDA area, the Court, in *Reed v. United Transportation Union*, 109 S. Ct. 621 (1989), agreed with the view,

presented by the Department as amicus curiae, that claims under Title I of that statute by union members against their union for "free speech" infringements are not governed by the six-month limitations period for unfair labor practice charges under the National Labor Relations Act, but rather by the longer state limitations periods for personal injury claims applicable to civil rights claims under 42 U.S.C. sec. 1981 and sec. 1983. Following that decision, the Court granted certiorari as requested in *Clift v. United Auto Workers*, 109 S. Ct. 830 (1989), a case presenting almost the same limitations issue, but in a factual context with a closer connection to the collective bargaining process, and remanded for reconsideration in light of *Reed*.

The Division enjoyed a very successful fiscal year in the courts of appeals, prevailing in virtually all of its cases. For example, the Division gained victory in several OSHA cases. In *Associated Builders & Contractors, Inc. v. Brock* and consolidated cases, 862 F.2d 63 (3d Cir. 1988), cert. denied, 109 S. Ct. 2062 (1989), the court upheld OSHA's revised hazard communication standard against all industry challenges. The court held that OSHA gave adequate notice to the non-manufacturing sectors that they might be included in a final standard; made appropriate findings of significant risk and feasibility in support of applying the standard to the non-manufacturing sectors; and did not unlawfully delegate its rulemaking authority when it incorporated into the standard a list of hazardous chemicals developed by a private organization. In another OSHA standards case, a panel of the Fifth Circuit, in *National Grain & Feed Ass'n v. OSHA*, 866 F.2d 717 (5th Cir. 1989), reversed itself on rehearing by deferring to the Department's view that Section 6(b)(5)'s mandate to set the most protective standard consistent with feasibility applies only to health standards, so that safety standards need only meet a more flexible "reasonably necessary or appropriate" test. Also in the context of OSHA, the court of appeals ruled in *In re Perry*, 859 F.2d 1043 (1st Cir. 1988), as urged, that mandamus was appropriate against an ALJ of the Occupational Safety and Health Review Commission who exceeded his lawful authority by excluding a union-affiliated

employee representative from a citation enforcement proceeding based solely on comments made by the union about the proceeding in union organizing literature.

In the mine safety and health area, the Division convinced the D.C. Circuit to defer to the Department's interpretation of the statute or applicable regulation in three cases. Thus, in *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51 (D.C. Cir. 1988), the court ruled that the Secretary has authority to issue a citation containing an "unwarrantable failure" finding based upon a violation that took place before it was detected by the MSHA inspector, and rejected the company's argument that such a finding could be made only in connection with violations directly observed by the inspector. Based on *Emerald Mines*, the court subsequently granted a motion to summarily deny the petition for review in *White County Coal Co. v. Secretary of Labor and FMSHRC*, No. 88-1174 (D.C. Cir. July 13, 1989), which presented an identical issue. And in *Secretary of Labor ex rel. Bushnell v. Cannelton Industries, Inc.*, 867 F.2d 1432 (D.C. Cir. 1989), the court agreed with the position that the regulatory requirement that coal mine operators retain the rate of pay of miners transferred to another job after exhibiting pneumoconiosis symptoms applied to a miner who, subsequent to his initial transfer to a low-dust work area, was transferred to a lower-paying position as part of a workforce reduction.

In the black lung compensation area, the Division successfully defended, in *Winzer Jordan v. Director, OWCP*, 876 F.2d 1455 (11th Cir. 1989), the constitutional adequacy of the Office of Workers' Compensation Programs' form letter denying black lung benefits and describing available appeal procedures. In *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300 (6th Cir. 1989), the court upheld the deputy commissioner's authority to correct an erroneous designation of the responsible coal mine operator in a claim filed ten years earlier, but not finally adjudicated. Unfavorable decisions, however, were handed down in two significant black lung cases. In *Committee on Legal Ethics of the West Virginia State Bar v. Triplett*, 378 S.E.2d 82 (W. Va. 1988) the West Virginia Supreme Court denied the Department's petition for rehearing of a decision holding that

the state's bar could not discipline an attorney who violated the Black Lung Benefits Act's requirements on attorneys' fees on the ground that the attorneys' fee system, as applied, unconstitutionally denies claimants due process. The U.S. Supreme Court has since granted a petition for certiorari filed by the Department. And in *Taylor v. Peabody Coal Co.*, No. 86-2590 (7th Cir. Aug. 28, 1989), the court of appeals, on remand from the Supreme Court following *Pittston Coal Corp.*, created a split in the circuits by holding that the rebuttal provisions of the Department's interim presumption of total disability due to pneumoconiosis are more restrictive than the comparable Social Security Administration provisions and therefore are contrary to the statute. The Department subsequently has filed a rehearing petition, which is pending.

In the longshore benefits area, the Division, in *Phillips v. Director, OWCP*, 877 F.2d 1231 (5th Cir. 1989), rehearing granted Nos. 88-4776 & 88-4789 (Aug. 30, 1989), asked the court to overturn *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981) and to hold that Section 10(f) of the Longshore and Harbor Workers' Compensation Act, while providing for annual cost-of-living increases to claimants who are permanently totally disabled, does not also give them the benefit of intervening increases that occurred during their period of temporary disability. The court agreed with our analysis but felt bound by circuit precedent. The en banc court then accepted the Division's suggestion for rehearing en banc and should decide the issue in FY 1990. *Phillips* also held, in accordance with the Department's view, that the Act permitted the employer/carrier to recover overpayments to the claimant on a periodic basis out of future payments owed by the Special Fund.

The Division also obtained two significant victories concerning the LMRDA. Especially noteworthy was the court's deference to the Secretary's interpretation of two exemptions to the Act's "persuader" reporting requirements in the controversial *United Auto Workers v. Dole* ("Kawasaki"), 869 F.2d 616 (D.C. Cir. 1989). The court sustained the view, first, that a law firm does not engage in reportable activity when it devises personnel policies to discourage unionization, so long as the law firm has

no direct contact with the employees and, second, that an employer need not report wage payments to its regular supervisors, regardless of whether these supervisors engage in persuader activities or even unfair labor practices. Also noteworthy was another court's rejection of certain restrictions placed on the Department's access to subpoenaed union minutes in *McLaughlin v. Service Employees Union*, 880 F.2d 170 (9th Cir. 1989). The court overturned, as interference with the Department's broad investigative authority, the district court's entry of a protective order that restricted access to subpoenaed union minutes to five designated Department employees and required the Department to list and copy portions of the minutes that it believed relevant to its investigation in the presence of the union.

Finally, in another case involving the Department's investigative authority, the court issued an amended decision in *McLaughlin v. Elsberry, Inc.*, 868 F.2d 1525 (11th Cir. 1989), that continued its prior decision upholding as constitutional the Department's authority under the Migrant and Seasonal Agricultural Worker Protection Act to enter without a warrant an employer's fields and labor camps to conduct confidential interviews with migrant farmworkers.

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Office of the Assistant Secretary for Policy

A primary effort of the Office of the Assistant Secretary for Policy (OASP) in FY 1989 was to manage the Department's processes for making policy decisions. While the Policy Office staff work with and critique proposals of other agencies, the Policy Review Board (PRB) provides a forum for discussion of important issues on a Departmentwide basis. The PRB is chaired by the Assistant Secretary for Policy, who, with the Secretary, is ultimately responsible for Departmental policy.

During 1989, the PRB concentrated on regulations. It reviewed and analyzed OSHA rules on confined spaces, blood-borne diseases, personal protective equipment, and air contaminants, all of which were approved for transmittal to OMB. The PRB also approved ETA's regulations for implementing the Economic Dislocation and Worker Adjustment Act Amendments to the Job Training Partnership Act (JTPA) and ETA's regulations to the Worker Adjustment and Retraining Notification Act. Other important regulatory topics which came before the PRB included legal immigration reform rules and homework regulations for women's apparel.

In addition to providing support to the PRB, OASP worked directly on a number of major initiatives:

JTPA Youth Employment Agenda. A major legislative item in which OASP participated was the development of the Department's youth employment agenda. The report of the advisory committee evaluating and reassessing goals of the JTPA recommended a number of substantive legislative changes to the Act. OASP worked closely with ETA to develop criteria for these substantive amendments. The package included amendments that will shift the focus of the JTPA toward "at-risk" youth--those young people who are the most disadvantaged and least able to enter the labor market without significant assistance in obtaining basic job skills. The amendments will also coordinate all human resource programs, enhance overall program quality and standards to measure improvement, and

strengthen program accountability. The Administration's package of amendments has been passed by the Senate.

Child Care. The staff of OASP provided intensive technical and analytical support in the development of the President's child care proposal, a package of tax credits targeted to low income families and increased funding for the Head Start program. This effort required increased coordination with OMB and with the Departments of the Treasury and Health and Human Services. The Office also provided staff and expertise to the Child Care Liability Insurance Task Force, which was established by the Secretary in response to a request by the President made in the Budget message to Congress. The report was released to the public in December.

Minimum Wage. The Office of Policy played a key role in creating the Administration's policy on the minimum wage. While ESA enforces the Fair Labor Standards Act (FLSA), the Policy Office has responsibility for analyzing the impact of the minimum wage on the economy and on job creation. Further, OASP developed comprehensive economic data, analysis and alternative policy options which were extensively utilized by the Administration during the policy development and presentation stages of the minimum wage proposal.

Workforce Quality Initiative. The Office contributed significantly to the development of the Secretary's Workforce Quality Initiative. This initiative focused on educating youth for the workforce, enhancing skills of employed workers, intensifying the use of available workers and improving labor market information.

Immigration. In response to past legislation amending the Immigration and Nationality Act, OASP was responsible for promulgating a regulation, signed jointly by the Secretaries of Agriculture and Labor, which sets forth procedures to be used to determine the "shortage number" of seasonal agricultural service workers.

Retirement and Health Care Policy. In the area of retirement, OASP directed development of the Department's policy on a variety of issues, namely: reversions of excess assets from overfunded pension plans; pension portability; pension

enforcement; and governance and taxation of pension funds. In addition, OASP worked closely with the Office of the Solicitor and the Pension Benefit Guaranty Corporation on matters affecting the disposition of health and retirement funds of Pittston Coal Company.

Workplace Substance Abuse Task Force. As its contribution to implementing the Administration's drug control strategy, the Office exercised overall responsibility for the Department's workplace substance abuse programs. It established and chaired a Departmental Task Force on Workplace Substance Abuse to facilitate the planning, implementation and coordination of efforts to reduce workplace substance abuse. Major efforts during FY 1989 included the continuation of the collection of information concerning the incidence and prevalence of illegal drugs in the workplace and efforts to assist workers that began in FY 1988. In addition, OASP managed a program of \$1.5 million in grants to employers and employer representatives to aid in the development of employee assistance programs and it represented the Department on a variety of interagency working groups.

Office of Program Economics

The Office of Program Economics devoted a significant portion of its time during FY 1989 to immigration-related policy development. Staff who served on the Departmental working group on legal immigration reviewed legislative proposals and developed positions that were circulated to other agencies as part of the interagency review process.

Program Economics developed the regulation that was promulgated pursuant to the Immigration and Nationality Act which outlines the procedures for determining the "shortage number" of agricultural workers. The shortage number establishes the number of aliens who may be admitted to the United States for temporary residence in order to make up for a lack of domestic agricultural workers. Such workers are known as replenishment agricultural workers (RAWs). The regulation was developed in consultation with the U.S. Department of

Agriculture (USDA), the Immigration and Naturalization Service and the Bureau of the Census.

To aid in determining the shortage number of agricultural workers, the Office implemented survey research needed to estimate the labor supply of seasonal agricultural workers. The results of these surveys, in conjunction with studies performed by the USDA, were used to make the first farm labor estimates mandated by the Act. These research efforts will continue through the end of 1992 when the congressional mandate for the RAW program ends.

In FY 1989 the Office also initiated a research project which attempts to determine the circumstances under which it is possible to recruit legally authorized U.S. workers to harvest perishable crops. This project will aid DOL in its effort to enhance recruitment programs for domestic agricultural workers. The aim of the project is to identify farm labor supply communities and estimate the potential "yield" of farm workers if enhanced recruitment were practiced in these communities. This project will continue into FY 1990.

In conjunction with ETA, the Office developed the Secretarial agenda on Workforce Quality. One of the Secretary's goals was to sharpen labor's competitive edge. She initiated cooperative efforts with other Cabinet officials to address education and training issues which would reduce the widening gap between the needs of employers and the skills of the nation's workforce. The Office worked to keep the Department's efforts in the Workforce Quality Initiative focused on improving education and training of the workforce, rather than on social services. It has also provided staff support for the Administration's proposed JTPA amendments which will target services on those individuals most difficult to serve.

The Office participated in an ETA-sponsored working group on Employment Service reform options. Staff prepared a background and concept paper reviewing the performance of the Employment Service, recent reform efforts, and future options.

In addition, this Office played a lead role in providing analysis for the Administration's minimum wage proposals. Training wage options were developed and estimates of job

creation effects were calculated. The Office also prepared explanations of the Administration's methodology for its estimates of minimum wage effects on employment.

The Office also reviewed and provided analysis for studies explaining the decline in the percentage of the unemployed who claim unemployment benefits. This review supported the findings that much of the decline is a result of changes in the structure of labor markets as opposed to changes in the Unemployment Insurance program.

Office of Regulatory Economics

The Office of Regulatory Economics acts as the principal staff for the PRB, with special emphasis on regulations and legislation concerning occupational safety and health, wage and hour standards, pension, health, and welfare benefits programs, workers' compensation, and nondiscrimination and affirmative action programs.

This Office is responsible for the development, tracking, and execution of the Department's portion of the Regulatory Program of the United States and for the Semi-Annual Regulatory Agenda. In doing this, it works closely with DOL agencies and OMB staff. Since the Department is the second largest regulatory agency in the Federal government, this involves dealing with approximately 100 major regulatory initiatives and a number of minor, technical regulations.

Among the specific regulatory items which came before the PRB during the year, staff provided significant support in health and safety issues to:

- Establish final regulations setting new Permissible Exposure Limits (PELs) for over 400 toxic chemicals;
- Establish new standards for trenching in the construction industry and for tunneling in underground construction;
- Finalize regulations concerning control of hazardous energy sources (lockout/tagout);

- Set standards for hazardous waste operations, explosives and blasting in underground coal mines;
- Outline whistleblower protections under the Surface Transportation Act;
- Limit lead exposures in nine industries; and
- Finalize safety protections for the use of powered platforms for exterior building maintenance.

Also, preliminary work was performed on regulatory proposals dealing with:

- blood-borne infectious diseases;
- six shipyard standards;
- electric power generation, transmission and distribution;
- metal and nonmetal mine explosives;
- logging;
- 4,4'-methylenedianiline;
- pattern of violations in mining and methods of compliance;
- hazardous work in confined spaces;
- the use of personal protective equipment;
- air quality standards in mines; and
- the use of lift slabs in construction.

Among specific issues in employment standards, the Office provided staff to:

- Finalize regulations defining the use of helpers under the Davis-Bacon Act and for the employment of workers with disabilities under the FLSA;
- Issue new proposals permitting homework in previously prohibited trades under the FLSA; and

- Develop a proposal regarding the use of "information systems integrators" under the Walsh-Healey Act.

In the area of pensions, staff provided assistance on the following issues:

- Finalize regulations specifying civil penalties and loans to participants under the Employee Retirement and Income Security Act (ERISA);
- Civil penalties and the allocation of fiduciary responsibilities under the Federal Employee Retirement Security Act (FERSA); and
- An interim final rule was also published regarding prohibited transactions under FERSA.

In addition to the direct work on regulations which were completed or for which proposals were issued, the Office brought together various agencies in working on other regulatory projects such as those with the National Institute for Occupational Safety and Health on blood-borne diseases, diesel powered equipment in underground mines, and the use of respiratory devices to prevent hazardous exposures. The Office represented the Department on the Committee on Interagency Radiation Research and Policy Coordination which reports to the Director of the Office of Science and Technology Policy on all issues related to radiation exposures and possible compensation.

In addition to these regulatory activities, the Office worked on many legislative and research issues. Staff in the Office: drafted chapters of the Secretary's report to the President on liability insurance for employer-sponsored child care and edited portions of the document; negotiated language on health insurance provisions and employment standards included in the Americans with Disabilities Act; researched and reviewed parental and medical leave bills; drafted material for

the Secretary on general whistleblower proposals, health care proposals, reversions of excess assets of terminated pension plans, and the minimum wage bill.

Other research efforts which were pursued either by Office staff or jointly with other agencies include:

- the effect on the economy and on employment of mandating that employers provide health insurance;
- with EEOC, on the validity of fitness testing for police and firefighters;
- with ESA, on the effectiveness of medical fee regulations under the Federal Employees' Compensation Act;
- with BLS, OSHA, and MSHA, on improved measures of occupational injury, illness, and fatality reporting; and
- with several interagency committees, focusing on improving statistics on and services to the disabled.

Finally, the Office provided support for the Secretary in her role as a trustee of trust funds related to Social Security and Medicare and as chairperson of the board of directors of the Pension Benefit Guaranty Corporation. Of particular importance to the Secretary's role as trustee is the work the Office has done jointly with HHS on the key assumptions underlying the Social Security Trust Fund estimates and with HHS and Treasury in developing valid estimates for various health care trust funds.

Office of Economic Policy Analysis

The Office of Economic Policy Analysis provided staff support for policy formulation and program implementation in the areas of labor-management relations, international labor affairs, labor-management standards and related labor market developments.

Collective bargaining and industrial relations were the issues upon which most interest was focused.

Also provided were demographic data and analysis in support of numerous policy issues, including the training wage component of the minimum wage, Earned Income Tax Credits, poverty, child care and health care coverage.

The Office continued to oversee and coordinate the Department's Information Collection Budget process, as mandated by OMB. This included analysis and review of the Department's initiatives to reduce paperwork burden hours in its largest regulatory programs. Staff also monitored efforts in the Congress to reauthorize the Paperwork Reduction Act.

The Office continued to follow the issues of U.S. international competitiveness and productivity. Because increases in productivity are to a great extent dependent upon improvements in the quality and utilization of human resources, labor policy issues were examined carefully for their ramifications in this context. At the same time, economic events and policies can have an impact upon the well-being of American workers. For this reason, the input-output model developed in this Office was updated to incorporate the latest available data. This large econometric model links economic occurrences to direct and indirect job opportunity gains and losses at the industry level and provides input into policy deliberations.

The Office also continued to represent the Department on the Local Employment Initiative Project of the European Organization for Economic Cooperation and Development (OECD). This project analyzed and reported on various local employment-generating programs in use within the OECD member countries.

Office of Research and Technical Support

The function of the Office of Research and Technical Support is to provide diverse policy and program support to OASP and the Office of the Secretary. This includes internal and contract research, computer support, and economic and historical analysis.

In FY 1989, the Office analyzed economic and demographic data in support of program and policy issues. While analysis of the data on the labor market, compensation and prices originating in the Bureau of Labor Statistics received particular attention, a broad range of real and financial data were closely monitored. This provided for in-depth analysis of diverse economic issues on a timely basis. The Office provided detailed data, analysis and graphic support on numerous policy issues, including minimum wage, child care, and mandated benefits. The Office also began preliminary analysis concerning the economic impacts of the acid rain portions of the President's proposed Clean Air Act Amendments.

Questionnaires were designed and data compiled for use by the Secretary's Child Care Liability Insurance Task Force. The Office contributed to research on farmworkers and on immigration demographics for immigration reform legislation. Reports were also prepared with respect to the ongoing Congressionally-mandated Departmental study and review of the Black Lung Benefits Program. This program evaluation is assisting in efforts to improve services to disabled coal miners and their families.

The Office co-managed the ADP systems for ASP and sponsored the Departmental NIH and private computer service contracts. It continued to provide computer programming support for various agency research, management and administrative functions. During FY 1989, it developed an expanded status-of-regulation tracking system to include various specialized reports. Systems for backing up and restoring the tracking system database, as well as various internal management information system reports, were developed as well.

During FY 1989, the Office obligated approximately \$4.5 million for research and evaluation projects. Over \$2 million was for continuing efforts to gather information about farmworkers. Another \$2 million was for grants to develop assistance programs to deal with employee drug and alcohol abuse. The Office continued contracts to develop, review and evaluate educational tools for workers on the effects of alcohol and drug abuse. Studies were also funded on these subjects:

protecting workers from exposure to blood-borne diseases; fitness-testing for police and firefighters; methods used in preparing Old Age and Survivors Disability Insurance Reports; and OSHA's proposed standard on cadmium.

The Office responded to numerous inquiries from Departmental staff, Congress, the news media, and the general public on the Department's history. It was also consulted by historians and social scientists, advanced students, and photo researchers for advice on historical topics and for access to the Office's historical resources. In addition, the Office prepared all official records of the meetings of the PRB.

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Office of the Assistant Secretary for Administration and Management

Departmental operations during the 1989 fiscal year were marked by efforts to improve operations and services without increasing costs. Keeping in mind the urgency to reduce the budget deficit, the Office of the Assistant Secretary for Administration and Management (OASAM) took the lead in promoting and coordinating the Department's participation in the Administration's program to improve the quality, productivity, timeliness and efficiency of services and programs, both in the national office and the regions. OASAM also continued its leadership role in connection with DOL 2000 whose objective was to make the Department a model employer and a more productive place to work.

Directorate of Administrative and Procurement Programs

A major accomplishment was made this past year in the area of procurement management by implementing the use of credit cards for small purchases in the national office and the regions, thus reducing administrative costs and processing time. Also in the area of procurement management, the reviews/negotiations performed by the Division of Cost Determinations staff resulted in cost savings of \$4.9 million, while over \$5 million in potential costs were questioned in field pricing reviews.

Considerable progress was made during the year in support of the continuing effort to make the Department a model employer by servicing employee needs in the areas of child and elderly dependent care. Information and assistance were provided to DOL employees in the national office and throughout the regions and a labor and management committee was formed to further advance national office dependent care awareness and information services. In addition, several physical

improvements to the Frances Perkins Building day care facility were completed, thereby strengthening the ability to serve the needs and insure the security of the 125 children currently enrolled.

During FY 1989, continuing emphasis was also placed on enhancing the quality of work life and building operations in the Frances Perkins Building. Building improvements this fiscal year included complete replacement of the roof; installation of a computerized monitoring system for building equipment operations; placement of energy conservation devices to reduce unnecessary electricity consumption; and increased security measures, including additional exterior lighting and more extensive guard patrol service. With support of the General Services Administration, the design phase of a major elevator upgrade project was started during the year, with installation expected to commence in 1991.

Initial steps were taken in FY 89 for transition to the Washington Interagency Telecommunications System (WITS) for the National Capitol Area, and to the FTS 2000 System, the Government's new long distance network. Both systems will become operational in FY 90. In the DOL Library, the existing circulation system was replaced with a fully integrated, microcomputer-based library system, allowing future capability for an on-line, public access catalog.

Directorate of Personnel Management

In FY 1989, the Directorate of Personnel Management focused its activity on improving Departmental personnel processes. Improvements in the staffing area were intended to insure that the Department continues to attract well qualified candidates and included: a telephone information service offering information on the Department's vacancies in the Washington area, a major Hispanic recruiting initiative, additional examining authority from the Office of Personnel Management (OPM), and a staffing guide offering supervisors methods and approaches that may be used to fill vacancies.

The classification staff, in conjunction with OPM, developed a one-of-a-kind general classification guide for DOL

compliance agencies (ESA, OSHA, PWBA, and OLMS) which will potentially cover 2,500 positions. In the area of assessing employee performance, a new performance management system, which includes a performance award plan, was implemented for most DOL employees.

In concert with the Comptroller and the Directorate of Information Resources Management, several key process improvements were implemented which markedly reduced the time required by personnel offices and financial management activities to process separations. By the end of the 1989 fiscal year, the Department had increased its separations processing efficiency above the 80 percent rate within the 30-day target set by OPM. This accomplishment is particularly noteworthy when the 30 percent rate in September 1988 is compared to the current rate of 88 percent.

In an effort to provide managers and supervisors with practical information on employee performance and conduct problems, as well as key labor-management relations statutory and contractual information, DPM developed, and pilot-tested, a labor-management and employee relations course for managers. Agencies and regions began offering the training on a recurring basis in May.

Directorate of Civil Rights

In FY 1989, the Secretary of Labor's goals to increase the representation of Hispanics at all levels and of minorities and women at grades GS-13 and above, continued to be an OASAM priority. Special emphasis in recruitment and hiring resulted in a net increase in Hispanic employment of 65, raising the rate for Hispanics from 4.6 percent to 4.9 percent. For minorities and women in Grades 13 through SES, the net increase of 16 increased the representation rate from 33.1 percent to 34.5 percent.

Initiatives to ensure nondiscrimination and accessibility for persons with disabilities in DOL-conducted programs has gained the Department commendations and praise for its leadership role among Federal agencies. An interagency

agreement with the Public Health Service was implemented for reviewing requests for reasonable accommodation.

Coordination and linkages efforts with the recipient community improved. The Directorate of Civil Rights maintained a visible role with that community by significantly increasing its participation in conferences sponsored by national organizations representing employment and training interests, e.g., the Interstate Conference of Employment Security Agencies and the National Alliance of Business.

Office of Safety and Health

Continued progress was made toward the goal of ensuring a safe and healthful workplace for all DOL employees through active safety and health committees, training and education, internal program self-evaluation, on-site inspections, improved accident/injury reporting, and health services.

Noteworthy during this period were: the development of a DOL Hazard Communication Program for protecting agency employees who may be exposed to hazardous chemicals in their line of work; implementation of a new awards program to recognize employees who make significant and outstanding contributions to the safety and health program; further development of methods aimed at reducing resource losses resulting from falls in the workplace; promotion of seat-belt use by DOL employees on and off the job; and development of policies and procedures governing the utilization of video display terminals as VDTs relate to the safety, health, and comfort of the DOL employees who use them.

Also during the year, the Department realized its goal of obtaining Employee Assistance Program coverage for 100 percent of its employees. Fitness wellness/educational activities conducted during the year included: various physical exercise programs, breast self-examination, first-aid course, smoking cessation, nutrition, healthy child-bearing, Alzheimer's Disease, blood pressure, latch-key children, holiday blues, and crack/cocaine and the distribution of literature on a myriad of health-related subjects.

Regarding the DOL Drug Free Workplace Program, movement was made toward full implementation of the Department's Drug-Free Workplace Plan by contracting for all drug-testing related services; continuing employee education on substance abuse and assistance to overcome drug abuse; and concluding direct impact and implementation bargaining with both DOL-wide unions on the plan.

National Capital Service Center

Efficiency, effectiveness and improvement in service continued to be the challenges facing the National Capital Service Center (NCSC) during the year.

The Clerical Support Program (CSP), which has been well received throughout the Department, ended its second year of operation as a continuing success. CSP continues to provide a cadre of trained, highly professional, job-ready clerical personnel who complete rotational assignments with NCSC client organizations. Approximately 35 participants have completed the program and have been placed in permanent jobs throughout the Department.

Another significant accomplishment which serves both the Department's employees and the general public has been the installation of a job vacancy announcement kiosk. This computer-based kiosk, in the lobby of the Frances Perkins Building, provides information concerning the types of jobs available within the Department, as well as specific job vacancy information.

Comptroller

During FY 1989, the Comptroller focused attention primarily on those projects and activities which serve to increase the efficiency, timeliness and accuracy of the Department's financial operations.

In accordance with this objective, significant strides were made in the implementation of DOLAR\$, the Department of Labor Accounting and Related Systems. Once it becomes operational in early FY 1990, DOLAR\$ will offer a commercially maintained interactive administrative accounting

system which will conform to the General Accounting Office's (GAO) accounting principles and satisfy internal management needs and the reporting requirements of the Office of Management and Budget and the Department of the Treasury.

This fiscal year has seen refinement and testing of the core accounting function, including design and implementation of the systems pre-processor, the development of several computer generated reports, completion of the initial security module, and the training of more than 250 employees.

The Comptroller was also responsible for the successful implementation of the Central Payment System, which utilizes the more efficient, less costly, electronic funds transfer method of processing DOL vendor payments. Following decentralized approval of payment by Department of Labor regional and agency finance offices, the payment data is transmitted to the Office of Accounting for consolidation and forwarding to Treasury for processing through the Automated Clearing House. This new procedure significantly reduces workload in the decentralized finance offices by shifting responsibility for the payment process to the Comptroller.

In conjunction with the Department's Office of the Inspector General, the Comptroller undertook numerous projects to improve financial management and reporting and fiscal integrity, including: year-end Treasury reports which conform to GAO standards and can also provide the basis for developing an annual financial report of the type used in the private sector; preparing the first combined audit/management report on the status of open audit findings and recommendations as required by the Inspector General Act Amendments of 1988; and identifying and developing a report to monitor the status of corrective action plans for all significant weaknesses addressed in the Federal Managers' Financial Integrity Act report to Congress.

Directorate of Information Resources Management

The Directorate of Information Resources Management (DIRM) designed a plan for a DOL office automation environment and developed a strategy for the acquisition of office automation

workstations, software, Local Area Network (LAN) equipment, technical assistance, and systems development assistance.

DIRM sponsored and conducted two LAN conferences to provide technical guidance to all Department agencies in the planning, acquisition, implementation and management of the new LAN technology being implemented in the Department. DIRM also developed and issued policies on computer security and the development of automated information systems.

As a result of the exemplary rating received from the General Services Administration (GSA) for information resources management planning, policy, and acquisition procedures and review program, GSA restored the Department's blanket procurement dollar thresholds for the acquisition of information technology resources to the full limit authorized in the Federal Information Resources Management Regulations.

DIRM coordinated the Department's efforts in connection with the Government-wide Productivity Improvement Planning and A-76 (Commercial Activities) programs that are designed to improve the quality of services to the public but at reduced costs.

With respect to the Information Collection Budget, the Department, under DIRM leadership, made major paperwork burden reductions in excess of 18 million hours in FY 1989. While this overall reduction fell short of the OMB goal by approximately 4 million hours, the reductions demonstrate the Department's commitment and ongoing efforts to manage and reduce the reporting burden.

OASAM Regional Offices

Efforts to improve productivity, quality and timeliness in products and services and to make the Department a better workplace were not confined only to the National Office. All regional OASAM components contributed as well to the dual goals of productivity and quality improvement and of creating a better workplace for DOL employees.

For example, the Boston regional office concentrated on (1) Improving the timeliness in processing employee separation/retirement documents internally and ultimately to

OPM; 100 percent of all retirements and 85 percent of all other separations were timely processed during the fiscal year, (2) Improving the timeliness of regional recruitment actions which included a thorough review of current processing procedures and implementation of a PC-based tracking system, (3) Revitalization of the regional training program with heavy emphasis given to on-the-job-site computer training, and (4) Improving the quality of the work environment with the opening of a fitness center and a wellness program for employees in Boston.

The Department, through the New York OASAM office, serves as the lead agency for a Cooperative Administrative Support Unit (CASU). The CASU concept encourages Federal units at the same location to cooperatively combine their resources and share common administrative services in the interest of reducing costs and improving quality.

In terms of increasing computer literacy, the New York region has come a long way towards making its employees competent in office automation applications and technology. Noteworthy was the opening in April of a mini-computer learning center, an event at which Secretary Dole expressed her continuing support toward making DOL employees a highly skilled workforce. The center's monthly calendar includes a combination of scheduled classes and "open days" for individual learning and special assistance.

During the year, the New York OASAM served as lead agency in establishing a local Federal Financial Manager's Council with an OASAM employee as chairperson. The Council provides a forum for financial managers and other financial specialists from different agencies to meet periodically to exchange ideas and to discuss current financial problems and issues. The Council joined with similar Councils in Philadelphia and Boston to sponsor a joint meeting which was held in May.

In the Philadelphia region, OASAM personnel and payroll staffs contributed significantly to the Department's overall improvement in the timely processing of employee separations paperwork, meeting standards established for this task by OPM. It also was the first region to implement the

central payment system, a Departmental system for expediting payments to vendors through the automated transmission of data to the national office and Treasury.

In addition, a staff development pilot program was sponsored for employees in secretarial, administrative and technical positions. The pilot is designed to assist employees in learning and mastering life-long job skills in personal assessment, communications, problem-solving, time management and planning, and to identify personal goals consistent with the goals of the organization.

In Region IV (Atlanta), close coordination between the OASAM and the Regional Executive Committee achieved several milestones to meet the Secretary's goal of improving employees' quality of work and work-life. A contract was negotiated which made child-care resource and referral services available to all regional employees. The contract also provided for several seminars on child-care and rearing issues to be presented throughout the region.

A major initiative is underway which, in part, addresses the need to enhance DOL employee computer literacy. By the end of the fiscal year, spearheaded by the OASAM, the Atlanta Regional Office will open up a Computer Assisted Learning Center (CALC). This facility will provide employees the opportunity to learn technologies associated with automated data processing.

In the Denver region, through the efforts and accomplishments of the OASAM staff, the Colorado Coalition for Persons with Disabilities named the Labor Department "1988 Employer of the Year" in recognition of work experience programs which have provided disabled persons employment and training opportunities. As a result of these efforts a substantial number of permanent job placements were made with DOL.

The Denver Mayor's Office of Child Care Initiatives named the DOL as one of 12 employers recognized for providing employees with innovative child care options. The region's child-care information and referral service was cited in a comprehensive study of local employees. Study findings were announced at an awards presentation at which a Certificate of

Recognition was presented to DOL by Denver Mayor Federico Pena. The region also participated in three CASU child-care center projects.

To improve the quality of work life for its employees and to enhance the quality of customer services, the San Francisco OASAM held an off-site organizational planning conference and several divisional conferences to generate ideas.

A Multi-Cultural Heritage Week event was held to combine the observance of special emphasis programs, including Black History Month, Asian Pacific American Heritage Week, and Hispanic Heritage Week.

An employee fitness committee was formed and a plan for expanding the on-site facility and activities, including additional equipment and utilization of a part-time fitness consultant was approved. The region's safety and health program also provided several informational forums, distributed a wealth of written health and wellness materials and established a safety and health film/video library, and developed and disseminated employee lending procedures.

In terms of quality of worklife improvements, a contract was entered into with an elder care resource firm to prepare a resource/referral guide for Region IX staff and to provide employees orientation on this important topic.

The San Francisco OASAM developed and implemented a local microcomputer application which enables the servicing financial office to prepare payment schedule information on computer tape for faster and more accurate processing by Treasury. There are reportedly no other similar systems in the Government which allow a PC to write payment schedule information to tape. The system was implemented in the fourth quarter and preliminary data indicate a productivity improvement of nearly 29 percent due to decreased staff time needed to prepare and print out the schedules.

The San Francisco regional personnel office worked closely with OSHA to ease the retrenchment of agency staff from over 220 to 60, due to the reinstatement of the California State OSHA program. Through strengthened placement efforts and close counseling of affected staff, the Personnel Office

assisted OSHA in meeting the required staff reductions without the need for formal reduction-in-force (RIF) procedures. The transition of the California State OSHA program to Federal OSHA and subsequent reinstatement of the State program required the closing of five new offices and establishment of a new office in Carson City, NV.

The foregoing is not an all inclusive report on the activities of the OASAM field staff in improving productivity and quality of services and work-life. Rather it illustrates the wide range of accomplishments designed to achieve the Secretary's goals of providing better service to the public through dedicated and better trained employees working in a quality environment that stimulates excellence in performance.

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Bureau of International Labor Affairs

The Bureau of International Labor Affairs (ILAB) pursued new initiatives and followed through with existing pursuits during the 1989 fiscal year.

In international economic affairs, ILAB was actively involved in helping to develop U.S. positions regarding a wide range of important economic and foreign policy issues and evaluating their impact upon the economic and employment welfare of American workers. Selected economic and foreign policy issues included, but were not limited to, the Uruguay Round of Multilateral Trade Negotiations, Generalized System of Preferences, immigration reform, and the Japanese Structural Impediments Initiative.

In foreign labor affairs, the Bureau developed, promoted and implemented DOL international programs in support of the U.S. foreign and domestic objectives; built closer ties with friendly foreign governments, labor, and business groups abroad; and fulfilled labor-related requirements of U.S. legislation, particularly in the area of worker rights. Secretary Dole, accompanied by her husband, Senator Robert Dole, represented the President in the first top level meeting with Poland's new Prime Minister to focus on American assistance to Poland. The Secretary directed the Department's plans to provide technical assistance to Hungary also. In Washington, the Secretary met with high level labor officials from various other countries.

Working with international organizations under the guidance of the Secretary, ILAB directed the United States' participation and involvement in the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD), and several other international organizations.

International Economic Policy

ILAB was intensely involved in activities in the area of international trade and investment policy as the Administration

sought to implement its trade initiatives multilaterally and the Uruguay Round negotiations gained momentum after GATT (General Agreement on Tariffs and Trade) members resolved outstanding differences on negotiating objectives in April 1989.

In FY 1989, the Bureau, acting through its membership in the various interagency committees charged with trade policy functions:

- Helped develop U.S. positions for all negotiating groups of the Uruguay Round of Multilateral Trade Negotiations negotiating groups. ILAB staff attended several negotiating sessions in Geneva and drafted position papers for interagency discussion. Staff were particularly active in the areas of Functioning of the GATT System, Services, Market Access, and Safeguards.
- Devoted substantial resources to worker rights issues, particularly the implementation of the worker rights provisions of the Generalized System of Preferences (GSP), and the development of Administration positions and strategies to gain support for GATT consideration of the issue. In addition, ILAB was asked to review the State Department's reporting on worker rights practices in the Country Reports on Human Rights Practices. ILAB also drafted substantial portions of a worker rights report mandated by Section 6306(b) of the Omnibus Trade and Competitiveness Act of 1988, with an initial emphasis on worker rights in export processing zones.
- Collaborated in interagency review aimed at selecting "trade liberalization priorities" pursuant to the "Super 301" and "Special 301" provisions of the Omnibus Trade and Competitiveness Act of 1988. This review culminated in the identification of six

specific priority practices in three priority countries under Super 301 (quantitative import restrictions by Brazil, exclusionary government procurement practices in the satellite and supercomputer sectors in Japan, technical barriers to trade in forest products in Japan, trade-related investment measures in India, and barriers to trade in services trade in India). This process also led to the establishment of a "watch list" and a "priority watch list" of countries under "Special 301" with whom we are engaged in negotiations to improve their intellectual property protection law and practice. Related to the "Super 301" process was the establishment of the U.S.-Japan Structural Impediments Initiative on which the Bureau is also represented.

- Participated actively in meetings of the interagency subcommittee on steel to consider problems faced by the domestic steel industry and to develop policy recommendations for a program to succeed the steel VRA program which expired on September 30, 1989.
- Was one of the principal agencies involved in negotiations with foreign governments to renew Voluntary Restraint Agreements (VRAs) and gain bilateral agreement to eliminate trade-distorting practices in the steel sector as part of President Bush's Steel Trade Liberalization Program. ILAB staff also coordinated consultations and review of all activities related to implementation of the President's program with representatives of the United Steelworkers of America.
- Continued as a principal member of the U.S. delegations participating in the negotiation and renegotiation of bilateral agreements on textiles

within the framework of the Multi-Fiber Arrangement (MFA). One bilateral was newly negotiated and four bilaterals expired, bringing the total number of agreements in effect to 39. Additionally, bilaterals were renegotiated with five suppliers, and the renegotiation of bilaterals expiring at the end of 1989 were commenced with five other suppliers.

- Continued to participate in interagency efforts to stem import surges of uncontrolled textile and apparel products. The foregoing efforts resulted in consultations with some 14 countries.
- Participated in activities related to negotiations on bilateral trade issues, such as talks with Mexico under the U.S.-Mexico Framework Agreement, with Japan on several issues including the Structural Impediments Initiative, with Israel on the U.S.-Israel Free Trade Area Agreement, and with China on GATT accession.
- Participated in interagency discussions on problems and alleged violations of the January 1, 1989, U.S.-Canada Free Trade Area Agreement. Staff also participated in reviewing and negotiating on products requested by the private sector for accelerated tariff staging.
- Assisted in implementing the Administration's trade policy for developing countries under the Annual Review of the Generalized System of Preferences.
- Worked closely with other agencies in the review of the FSX Agreement with Japan concerning collaboration on the development of a new support fighter aircraft. ILAB focused resources on the

analyses of economic impacts of the proposed deal, employment impacts and possible implications of technology transfers on our industrial base.

- Participated in activities related to the Administration's effort to monitor the European Community's creation of a single market by 1992 (EC '92) which would eliminate all barriers to the movement of goods, services, capital and persons. ILAB took the lead within the U.S. interagency group in monitoring EC '92 developments regarding the social dimension to ensure that EC actions do not lead to policies that would harm U.S. workers.
- Helped develop an Administration position on the Caribbean Basin Economic Recovery Expansion Act and participated in interagency efforts to develop administrative measures to enhance the existing Caribbean Basin Initiative (CBI).
- Participated in an interagency investigation (Section 232 of the Trade Expansion Act of 1962) of the effect of imports of plastic injection molding machines on the national security, and in the preparation of a report to the President on the issue. Continued participation in U. S. bilateral discussions with foreign suppliers concerning imports of machine tools, also the subject of an earlier Section 232 investigation.
- Participated in meetings of the OECD Steel Committee and Steel Committee Working Party, focusing on the development of long-term solutions to the problems of international trade in steel.
- Participated in semiannual discussions with the Government of Japan to review and assess progress

made under the 1987 Market Oriented Sector Specific (MOSS) Agreement regarding sales of U.S.-made auto parts to Japanese companies.

- Participated on the interagency committee involved in assessing the economic implications of high definition television (HDTV) and other emerging technologies in terms of employment, income, and exports.
- Participated in the work of the interagency group on the OECD Committee on Investment and Multinational Enterprises to increase awareness of, and support for, the guidelines for Multinational Enterprises.

Immigration Policy and Research

In the areas of immigration policy and research, ILAB continued to participate in the formulation of U.S. immigration policy, to serve as the Department's experts on U.S. and international migration programs and practices, and to prepare position papers on international labor flows.

- The Bureau worked actively with the Administration on a variety of legal immigration reform proposals, representing the Department at Congressional hearings and interagency policy meetings. ILAB continued to lead DOL's Legal Immigration Task Force which refined the Department's positions on immigration issues.
- As a result of the Immigration Reform and Control Act of 1986, the Bureau has the responsibility for evaluating the labor market impacts for three of the major series of Presidential reports--those on employer sanctions and legalization, as well as the triennial comprehensive reports. The Bureau produced the

Department's contribution, "The Effects of Immigration on the U.S. Economy and Labor Market", for the first *President's Triennial Comprehensive Report on Immigration* which was submitted to the Congress in May 1989. In support of its increased research responsibilities, ILAB expanded its contract research program on immigration and labor force issues.

- Immigration policy specialists from ILAB continued to play the lead role for the U.S. Government in international forums discussing international labor flows. They served as the U.S. representative to the OECD Working Party on Migration, as the U.S. expert to the Monitoring Panel on Migrant Women and to the OECD Meeting on Demographic Aspects of Migration, and as U.S. representative to the U.N. Conference on Human Rights of Migrant Workers.
- ILAB continued to provide policy analysis on labor-related immigration issues to senior DOL policymakers, the Departments of State and Justice, and the Congress. The Bureau conducted analyses of various aspects of legal and illegal migration to the U.S. and prepared U.S. Government position papers on immigration issues for major U.S. and international conferences. ILAB's immigration policy specialists also presented a number of research papers at professional and international meetings.

Foreign Economic Research

The in-house research studies completed during FY 1989 include:

- a summary of empirical studies on the economic impacts of EC '92;

- an analysis of labor-management relations and job-restructuring in the North American automobile industry;
- a study of linkages between labor standards and trade;
- a continuing review of labor issues related to export-oriented assembly and processing operations in developing countries;
- the fifth annual report to the Congress under section 216 of the Caribbean Basin Economic Recovery Act (CBERA) on the U.S. employment effects of the CBERA; and
- a contribution to the Office of Management and Budget's fourth annual report to the Congress under section 309 of the Defense Production Act on the effects of offsets in defense-related export sales on the U.S. economy, industrial competitiveness, and industrial base.

ILAB staff were actively involved in assisting the Department's Commission on Workforce Quality and Labor Market Efficiency. They made several presentations at professional meetings and conferences and published research papers in professional journals. Background papers and organizational assistance were provided in developing plans for a symposium on labor standards and development that was sponsored by the Department.

Analytical support was provided to the U.S. Representative to the Manpower and Social Affairs Committee of the Organization for Economic Cooperation and Development (OECD) in the review and evaluation of several international comparative studies on labor market issues. Staff continued participation in an international study coordinated by

the OECD of structural change and new skills required for service-sector jobs and hosted an international conference where preliminary results from these studies were presented.

A number of research projects on international economic issues and labor were funded this fiscal year. Most of these research efforts were made possible through funding support provided by the Department's Employment and Training Administration (ETA).

International Organizations

The Office of International Organizations (OIO) is actively involved in several international organizations, chief among them the International Labor Organization (ILO) and the Organization for Economic Cooperation and Development (OECD).

The following are highlights of DOL's accomplishments in FY 1989 in connection with the ILO and the OECD:

International Labor Organization (ILO):

- In January 1989, President Reagan transmitted to the Senate, with a request for advice and consent to ratification, ILO Convention No. 160 concerning Labor Statistics. This is the first ILO convention to be considered for ratification following the historic ratifications of two conventions in 1988, which broke a 35-year moratorium. Convention 160 was transmitted to the Senate following a finding by TAPILS that ratification would not amend existing U.S. law and practice. The Senate Foreign Relations Committee was scheduled to hold a hearing on ratification of Convention 160 on November 1, 1989.
- In September 1989, the Tripartite Advisory Panel on International Labor Standards (TAPILS) completed an exhaustive legal review of a major ILO human rights convention, No. 105 concerning

the Abolition of Forced Labor. TAPILS concluded that, subject to two understandings clarifying the meaning of the convention, Convention 105 could be ratified without amending existing U.S. law and practice. TAPILS' report was forwarded to the President's Committee, which will consider whether to recommend that President Bush seek advice and consent to ratification from the Senate.

- In her address to the ILO Conference, Secretary Dole announced the award of three U.S. Government grants to the ILO. The grants, which totalled \$500,000, are intended to improve workplace substance abuse prevention programs, training programs for disadvantaged youth, and programs to identify and distribute learning materials.
- With very strong and active U.S. support, the Governing Body elected a new pro-Western Director-General, Michel Hansenne, former Belgium Labor Minister.
- The U.S. financial objective for the June 1989 Conference was achieved when the Plenary, in an almost unprecedented virtually unanimous vote, adopted a zero real growth program and budget for 1990-91.

Organization for Economic Cooperation and Development

OIO/ILAB represents the U.S. Government in meetings of the OECD's Manpower and Social Affairs Committee (MSAC) and coordinates participation in its subsidiary bodies. Our participation in the OECD focuses on identifying trends and problems in the manpower and social affairs area and discussing policy options. The subjects covered are employment policy, industrial relations, employment and unemployment statistics,

migration, women in the economy, social policy and initiatives for local employment.

In 1989 OIO/ILAB participated in a number of OECD activities that addressed Workforce 2000 issues:

- ILAB hosted an international conference in Washington, D.C., on technological change and human resource development in the service sector.
- In support of the Apprenticeship 2000 Initiative, the Department and the OECD sponsored a joint meeting on Innovations in Apprenticeship and Training attended by training experts from selected OECD countries.
- Another meeting of particular interest focussed on employment programs for the disabled. Next spring, the Department of Labor, the OECD, and the University of Maryland will hold a follow-up international conference with particular emphasis on employment programs for the mentally retarded in several OECD countries.
- In addition to these conferences, ILAB participated in OECD meetings on a variety of subjects including: employment, structural and technological change, industrial relations, the role of women in the economy, education and training in a changing economy, equal employment opportunity programs, labor market statistics, and international migration.

Foreign Relations

During FY 1989, the Office of Foreign Relations (OFR) continued its mission of developing, promoting, and implementing Labor Department international programs in support of the U.S. foreign or domestic objectives, building closer ties with friendly foreign governments and labor and

business groups abroad, and fulfilling labor-related requirements of U.S. legislation, particularly in the worker rights area.

At the beginning of the fiscal year, OFR reviewed worker rights sections of the State Department's human rights reports on 170 countries; reviewed and analyzed 12 petitions filed in 1988 under the Generalized System of Preferences alleging worker rights violations; completed and distributed the "Secretary of Labor's Report to Congress on Worker Rights Reporting"; reviewed and critiqued the State Department's Report to the Congress on the same subject; jointly conducted with OIEA and the Overseas Development Council a symposium on Labor Standards and Development at Georgetown University; distributed as a special issue of the Foreign Labor Trends Series "A Look at Worker Rights in Eastern Europe"; and initiated a special study of worker rights in Export Processing Zones in 11 countries. Because of the great need for a centralization of worker rights information, OFR created a Worker Rights Information Clearinghouse.

Under the Memorandum of Understanding between the Labor Department and the Israeli Ministry of Labour and Social Affairs, a seminar to explore the labor relations impact of new technologies and other issues was attended in Jerusalem by a delegation from DOL headed by the Deputy Under Secretary for Labor-Management Relations and Cooperative Programs.

Under the Labor Department agreement with the American Institute in Taiwan, two OSHA experts conducted three weeks of training in Taiwan in industrial safety and health; and ILAB conducted three weeks of seminars on in-plant training techniques in Taiwan.

As a direct result of the Secretary of Labor's meeting with the Turkish Labor Minister in Geneva in June 1988, the Bureau, with financial assistance and support from the U.S. Information Agency (USIA), conducted a two-week study tour for three high-level Ministry of Labor officials from Turkey.

In August 1989, the Secretary of Labor and ILAB's Deputy Under Secretary met in Poland with the Polish Prime Minister and other government officials and Solidarity leader Lech Walesa to discuss the first steps in a program of U.S.

labor technical assistance to Poland and Hungary which was announced by President Bush during his visit to Gdansk the previous month. DOL plans to undertake a significant technical cooperation initiative to help Poland and Hungary make their transition to labor market policies and institutions needed in competitive economies and democratic societies.

A number of high-level foreign dignitaries visited the Department during the fiscal year. Both the Belgian and British Labor Ministers visited the Labor Department and met with Secretary Dole. Also received by others in the Bureau were: trade unionists from Chile, Argentina, Guatemala, El Salvador, Panama, and Nicaragua, who are particularly interested and concerned about worker rights provisions of our trade legislation; the Chairman and the International Secretary of the Philippine Democratic Socialist Party; and a delegation of Japanese auto industry trade unionists who discussed the future of the Japanese domestic auto industry and problems with Japanese plants in the United States. OFR arranged for ILAB's Deputy Under Secretary to meet with the Japanese Minister of Labor in Tokyo. Also, ILAB's Deputy Under Secretary met with the Minister-Chairman, Hungarian State Office for Wages and Labor, while he was in the United States.

Some of OFR's other more important activities during FY 1989 included:

- arranging study tours for two groups of Hungarian labor experts;
- co-authoring an article published in the *Monthly Labor Review* on yen appreciation and the Japanese labor market;
- selecting a Washington Post reporter who participated in a workshop for labor journalists in Korea;
- participating in a symposium on the Brazilian Political Scene in 1989, sponsored by the Johns

Hopkins Center of Brazilian Studies; and

- completing a special study on "Privatization in Latin America".

The Bureau also designed and launched a series of seminars sponsored by the Agency for International Development (AID) to improve labor-management relations at the plant/company level in Guatemala.

ILAB and the Employment Standards Administration (ESA) worked closely on two projects designed to explore how other governments use vocational rehabilitation to reduce government disability retirement expenditures.

ILAB and the Bureau of Apprenticeship and Training jointly conducted an International Apprenticeship Symposium on "New Directions in Apprenticeship," hosted by the Organization for Economic Cooperation and Development in Paris.

ILAB assisted AID in evaluating its vocational training programs in Latin America and the Caribbean, Singapore, Thailand, and Saudi Arabia.

The Bureau continued to assist the Kingdom of Saudi Arabia to develop its vocational training system.

An ILAB staff member visited Kuwait's vocational education and training programs and outlined possible areas of improvement.

ILAB arranged study tours for approximately 90 foreign nationals in four separate groups that were sponsored by the Agency for International Development. Three of the groups were multi-regional and multi-language; the fourth group focused on Africa.

The programs were entitled: Women's Issues in the Workplace, Labor and the Media, Safety and Health Issues in Labor Relations, and Labor Relations in a Democratic Society. OFR arranged programs in the Department of Labor for 519 other foreign visitors, including five labor ministers, and hosted a group from the Portuguese Institute for the Support of Small and Medium Scale Enterprises.

OFR completed a guide to an "Inventory of Low Cost Labor Programs" in cooperation with other Labor Department agencies. Already under this program, the Bureau provided low-cost support to an industrial relations exhibit sponsored by USIS and the Regional Labor Attache in Kenya by furnishing a wide variety of printed materials and video tapes from DOL agencies, other government institutions, private sector organizations, and universities. At ILAB's request, the Deputy Under Secretary for Labor-Management Relations and Cooperative Programs taped an introductory message personalized for the exhibit. Also at a low cost, ILAB provided the U.S. Embassy in Brazil with a series of safety films reproduced on VHS tapes by OSHA's Training and Education Center in Des Plaines, IL.

The Department continued to support the U.S. Foreign Service labor attache corps. OFR participated in the State Department's Foreign Service Selection Boards, and helped train seven new labor officers. OFR contributed to a special study undertaken by Ambassador Herman Cohen on strengthening the labor attache corps. The Secretary of State initiated the study in response to a letter from the Secretary of Labor on this matter. As a follow-up to the first global labor attache conference, the ILAB Bulletin was introduced in October 1988 as a means of communicating with labor attaches and labor reporting officers on relevant current issues.

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Women's Bureau

During the 1989 fiscal year, the Women's Bureau continued to follow its congressional mandate, "to formulate standards and policies which shall promote the welfare of wage-earning women." In July 1989, the Bureau began work under a Secretary's Order designed to ensure coordination with the Department in the development and implementation of Departmental policies, programs, research, evaluation, and materials.

Bureau staff participated in the Department's Policy Review Board and other Departmental task forces and working groups to shape policy on child care (liability insurance), affirmative action for women in construction and aerospace, youth-at-risk, immigration, and other issues important to the employment and economic status of women. In an effort to strengthen knowledge of the services to which women veterans are entitled, the Bureau is also an active participant on the Advisory Committee on Women Veterans of the Department of Veteran Affairs.

The Director and Deputy Director traveled throughout the Bureau's 10 regions to gain first-hand knowledge of new programs and efforts being implemented in the public and private sectors. The continued increase in women's labor force participation, their emergence into a wider variety of employment options and the need for related support services formed the basis for the Bureau's focus for programs, research and analysis in FY 1989.

Special attention was directed toward issues that are expected to shape the workplace of the future. Such issues include child care, eldercare, flexible benefits, nontraditional jobs, training opportunities, and youth at risk.

Information and Publications

Following a successful series of columns syndicated nationally in FY 1988, the Bureau initiated plans for a new four-part series

of columns on various issues relating to work and family, plus two radio and one television public service announcement. Topics include working mothers, employers and child care, dependent care options, and the Bureau's Work and Family Clearinghouse.

Over 200,000 publications were distributed by the national and regional offices. New fact sheets published in FY 1989 include: "Women of Hispanic Origin in the Labor Force," and "Women in Labor Organizations." "Women's Bureau: A Voice For Working Women," is the title of the Bureau's new information brochure.

There continued to be a substantial demand for "Employers and Child Care: Benefiting Work and Family," and the "Work and Family Resource Kit." "Jobs For The Future," remained the Bureau's most requested publication, and was favorably mentioned in numerous national publications.

Work and Family Issues

The Women's Bureau built and expanded upon previous years' advocacy on behalf of workers balancing work and family responsibilities.

The Clearinghouse on Implementation of Child Care and Eldercare Services, or CHOICES, is the Bureau's computerized data base of employer-sponsored child care options that employers may access through a toll-free line or through written request. These options have been promoted as highly attractive additions to employee benefit plans and successful aids to employers' recruitment and retention efforts. A Secretary's task force, led by the Women's Bureau, marketed the Clearinghouse through a highly successful multi-media campaign.

The Clearinghouse is scheduled to expand during FY 1990 to include eldercare, and again in FY 1991 to include wages and job opportunities. A component, currently in developmental stages, will provide State initiatives related to work and family. It will offer a directory of State activities (including legislation and regulation) regarding child care, eldercare, alternative work schedules, and flexible benefits.

Affirmative Action

The Women's Bureau participated in an international symposium in Munich, "Achieving Parity for Women and Men in Europe and the United States," with emphasis on reaching equity in the labor force. The Bureau also identified sexual harassment and employment goals for women in construction and skilled trades as issues of concern for further study.

Women in Highway Construction is a jointly funded project of the Women's Bureau, the Employment and Training Administration (ETA), and the Federal Highway Administration (U.S. Department of Transportation) designed to identify barriers faced by women in the construction trades and develop a program guide to be used by State highway departments and contractors in recruiting and hiring women.

The Bureau joined with ETA to fund the Second Annual National Tradeswomen Conference in Chicago. Follow-up meetings with the National Tradeswomen Conference Committee to discuss further cooperative efforts resulted in the Bureau's participation in and development of the newly formed National Network of Tradeswomen. The Bureau is now preparing a Directory of Nontraditional Training/Employment Programs.

Occupational Safety and Health

The Women's Bureau notified approximately 200 women's organizations of the proposed revision of OSHA's standards on personal protective equipment for eye, face, head and foot protection. Bureau staff also spoke to several audiences on occupational health and safety issues affecting women workers.

Welfare Reform

The Women's Bureau continued its efforts in the area of welfare reform through the Higher Opportunities for Partnerships in Employment (HOPE) demonstration project, which utilizes the resources of the OIC's of America and private sector enterprises to develop the

marketable skills of welfare eligible women and encourage their personal growth.

Displaced Homemakers

Through the Displaced Homemakers Network, the Women's Bureau continued its work to improve employment opportunities for displaced homemakers, focusing on older women, minority women, and accessing the JTPA system. Efforts during the coming year (1989-1990) will be concentrated on one State from each of the 10 regions. The goal is to reach approximately 304 local projects. The effort will give in-depth assistance to each of these programs as well as ongoing technical assistance to other displaced homemaker programs and interested groups.

International

The Women's Bureau has been an active participant in the Organization for Economic Cooperation and Development (OECD). An American delegation attended the meeting of Working Party #6 on the Role of Women in the Economy. In collaboration with other Departmental agencies, the Bureau has supported an OECD study to examine skills required for service sector jobs. The seven-country study includes a series of papers focusing on financial, business and health services, all of which have a large concentration of female workers.

As a result of a special 1986 "Local Area Initiatives . . ." program of the OECD/ILES to enhance member nation economies through development of entrepreneurship among women, the OECD will publish a report based largely on U.S. experience. The report, funded jointly by several member countries, including the United States, is scheduled for publication in early FY 1990.

The Women's Bureau responded to questionnaires for ILO on conditions of employment, and for the United States Commission on the Status of Women on women in the United States as a follow-up to the 1985 United Nations Conference in Nairobi, Kenya.

During FY 1989, the Women's Bureau briefed 101

international visitors about Women's Bureau programs and activities and the status of working women in present day America.

Research

The Women's Bureau is in the final stages of research with the National Academy of Sciences/National Research Council for a study of employer policies and working parents. The research, which is scheduled for completion in mid-FY 1990, will focus on factors shaping employers' decisions and the advantages and disadvantages of alternative policies for both employers and employees in different family structures.

The Women's Bureau initiated research with the University of Kentucky to study career mobility of female executives in a variety of industrial, service, and government organizations. Critical factors will be investigated, including the broad issues of sex role socialization, internal career paths and tracking for women in management, interpersonal processes and individual career vs. family decisions. This research will go beyond affirmative action programs to examine the more subtle individual and organizational processes that potentially limit or promote the career advancement of women.

Regional Programs

The Women's Bureau regional offices sponsored programs throughout the country, including a teen parent employability demonstration in Missouri focusing on education, vocational training and long-term employability preparation, coupled with support services.

The Equity Training Model program for New Hampshire public schools was designed to assist young girls and young women to meet their developmental needs in career, educational and personal/social areas, and a Women in Poverty conference held in Washington State examined needs in housing, child care, employment, training and education, and aging women in the over-all context of the feminization of poverty.

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Office of Inspector General

During fiscal year 1989, the Office of Inspector General (OIG) continued to pursue its mission to detect and prevent fraud, waste, and abuse as well as to improve the economy and efficiency of the Department of Labor's programs and operations

Investigative results included 2,116 cases opened; 2,660 cases closed; 1,024 cases referred for prosecution; 193 cases referred for administrative action; and 1,121 cases resulting in successful prosecutions bringing \$16,631,029 in recoveries, restitutions, fines, settlements, cost efficiencies, and administrative penalties.

During fiscal year 1989, the OIG reported its belief that the Department's overall enforcement strategy continued to place an inordinant reliance upon civil and administrative remedies at the expense of criminal enforcement. The OIG further expressed its view that this strategy would not provide an effective deterrent to abuse, particularly in the areas of worker health and safety, employee benefit plans, and employee wage and hour standards. The OIG testified before congressional oversight committees that the workers who need Government protection from fraud and corruption in these areas would benefit directly and indirectly from an enforcement strategy in which flagrant abuses are addressed with vigorous criminal investigations and remedies commensurate with the offenses.

Related to this concern, the March 1989 Department of Justice opinion requested by the Department on OIG investigative authority had the effect of limiting the criminal investigative scope of the IG's Office of Investigations. It is the OIG's view that in addition to the effect it would have in preventing the OIG from achieving the goals which the Congress envisioned when it enacted the Inspector General Act of 1978, this opinion would further hinder the Inspector General's efforts to address a flawed enforcement strategy within

the Department of Labor. The OIG also testified that further delay in resolving the Inspector General's investigative jurisdiction is not in the public interest.

Audit initiatives during this year resulted in numerous economy and efficiency findings and recommendations. The OIG issued 750 audits of program activities, grants, and contracts. Audit exceptions totaled \$146.9 million. Of the reports resolved, there were \$108.5 million in disallowed costs.

During this period, the OIG reported to the Department and the Congress its concerns that ERISA safeguards, including the annual report for all pension plans prepared by an independent public accountant (IPA), are not adequate and that pension risks are a matter of serious concern. An OIG audit of the quality of IPA audits of pension and welfare benefit plans covered by ERISA stressed the need for changes in the process to increase protection for plan participants. The Department agreed to take action to resolve many of the recommendations raised in the OIG's report. Nevertheless, the OIG remains concerned that the Department's corrective actions in regard to limited scope IPA audits are inadequate and that further empirical studies being considered by the Labor Department are not needed and would only delay obtaining the necessary audit coverage of plan assets.

The OIG also completed an evaluation of the efficiency and effectiveness of the Department's Pension Welfare Benefit Administration's (PWBA's) public disclosure function. The OIG found that PWBA internal controls were inadequate to track disclosure requests and ensure that summary plan descriptions are received from plan administrators. This resulted in PWBA meeting neither ERISA disclosure requirements nor congressional intent. PWBA initiated plans to implement corrective action.

Also during this period, OIG audit work showed poor program and financial accountability and widespread, apparently abusive situations with the administration of the Job Training Partnership Act (JTPA) program. The OIG is concerned that after 7 years of JTPA and \$18.5 billion in program expenditures, no one knows the return on investment or the effectiveness of

established program standards. The OIG testified on the program and proposed amendments.

During this fiscal year, the OIG expressed its concern to the Labor Department and the Congress that the Department, in its effort to ameliorate its accounting and internal control deficiencies, may be precipitously dependent on its new, untried general ledger system. In addition, because the Department grants over 85 percent of its funds to State and local governments, it continued an inappropriate reliance on unproven grantee financial reports.

The OIG received and tracked 2,806 allegations of fraud, waste, or other irregularities in Department programs, nationwide.

The OIG's Office of Labor Racketeering (OLR) continued its commitment to the investigation of corruption in employee benefit plans, labor-management relations, and internal union affairs. During this period, OLR investigations produced 76 indictments and 77 convictions. Investigations resulted in \$5,074,230 in fines and restitutions.

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Employees' Compensation Appeals Board

The Employees' Compensation Appeals Board (ECAB) rendered 1,906 decisions during fiscal year 1989. The Board makes final decisions on appeals arising under the Federal Employees' Compensation Act involving work connected injuries and diseases. Board decisions are not subject to judicial review.

The Board began FY 1989 with 883 pending appeals. During the year 1,943 new appeals were received and 1,906 were decided, leaving 920 cases pending at the end of the year. The Board conducted 53 oral argument hearings in Washington, DC, during the year.

The average time lapse between the receipt of a case record from the Office of Workers' Compensation Programs and disposition of that case by the Board in fiscal year 1989 was 3.1 months.

The acquisition of microcomputers for use by staff throughout ECAB in preparing and tracking cases has resulted in enhanced timeliness and quality of case processing.

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Benefits Review Board

The Benefits Review Board's accomplishments during FY 1989 nearly matched the unprecedented high productivity that characterized the previous fiscal year.

During fiscal year 1989 the Board issued 4,021 decisions, 16,518 non-final orders and 1,012 decisions on petitions for attorney's fees.

During fiscal year 1989 the Board received 4,459 appeals, 18,447 motions, and 799 petitions for attorney's fees.

At the close of the fiscal year there were 7,986 cases pending before the Board.

Black Lung Act Cases

The Black Lung Act provides for review of final orders of the Benefits Review Board by any United States Court of Appeals for a circuit in which the miner's injury arose. 33 U.S.C. §932(a). The statutory and regulatory provisions enacted and implemented under the Black Lung program have been interpreted by the various United States Courts of Appeals in decisions that are often in conflict. See *Pittston Coal Group v. Sebben*, 109 S.Ct. 414, 12 BLR 2-89 (1988). Consequently, in cases in which the miner engaged in coal mine employment under the Act in more than one federal circuit, the difficult question of applicable United States Court of Appeals precedent arises. In *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989), the Board announced that, in the interest of the orderly administration of the Act, it would internally resolve this choice of laws problem by applying the precedent issued by the United States Courts of Appeals for the circuit in which the miner most recently performed coal mine employment as defined under the Act. The Board noted that this practice will not impair the rights of any aggrieved party to seek review of Board decisions in the United States Court of Appeals for any circuit having jurisdiction under Section 921(c), and consequently, that this practice will not preclude cases in which Board decisions

are reviewed by courts holding views contrary to the interpretations of law that have been applied by the Board.

In FY 1989, the Board addressed another crucial issue arising from the conflicting interpretations of pertinent law issued by the Courts of Appeals. In *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989), the Board rejected the argument that, in cases in which appellate interpretations of applicable law, issued subsequent to adjudication of a case at the hearing level, substantially modify the impact of pertinent law and alter the outcome of the case, the case must be remanded to the administrative law judge for further submission of evidence relevant to the law as currently construed. The Board held in *Lynn* that whether such reopening of the record was appropriate would be a discretionary determination for the administrative law judge.

In FY 1989, the Board addressed two issues of particular importance to the Black Lung program because they are relevant to the threshold question of the time frame within which claims must be filed. In *Bianco v. Director, OWCP*, 12 BLR 1-94 (1989), the Board addressed the requirement that, for a claim to be valid, it be filed during the claimant's lifetime, and determined that the filing of a claim by the estate of the putative claimant, in the absence of a written statement by the decedent indicating an intention to file a claim, was invalid under the Act and pertinent regulations. Of more far-reaching effect is the Board's construction of the statutory time limitation on the filing of claims, provided at Section 422(f)(1), (2), to require a determination by the administrative law judge concerning whether a disability finding constitutes the medical determination necessary to trigger the three year limitation period mandated by the Act. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989).

Consistent with the progressive nature of pneumoconiosis, the disabling disease with which the Black Lung program is concerned, the Act and regulations provide for the filing of claims subsequent to a denial of benefits. In FY 1989, the Board resolved several procedural and substantive issues concerning the filing of both petitions for modification, pursuant

to 33 U.S.C. §922 as incorporated into the Act by means of 30 U.S.C. §932(a), and duplicate claims, pursuant to 20 C.F.R. §725.309. Regarding the filing of petitions for modification, the Board addressed various issues concerning the substantive basis for modifying a decision, including the question of whether previously obtained, as compared with newly discovered, evidence provides an adequate evidentiary basis for modification, see *Cole v. Director, OWCP*, 13 BLR 1-60 (1989), and the question of whether the correction of an administrative law judge's error in applying the law to undisputed facts properly falls within the ambit of modification under Section 22, see *Donadi v. Director, OWCP*, 12 BLR 1-166 (1989), *aff' on recon.*, 13 BLR 1-24 (1989). Concerning the proper procedures to be followed under Section 22, the Board held that telephone calls to the deputy commissioner, Office of Workers' Compensation Programs, from a claimant, expressing an intention to seek further compensation based on a change of condition, that were memorialized in the record could constitute a petition for modification, see *Madrid v. Coast Marine Construction Co.*, BRBS , BRB Nos. 85-2023/A (Apr. 28, 1989), and held that the question of whether a formal hearing were to be held in connection with determining whether a basis for modification had been demonstrated was a discretionary determination for the administrative law judge, see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In *Sahers v. Director, OWCP*, 12 BLR 1-193 (1989), the Board addressed the filing of successive claims under the Act and, in an effort to enhance efficiency in disposing of appeals involving duplicate claims filed prior to the issuance of the Board's initial construction of the applicable duplicate claims provisions in *Lukman v. Director, OWCP*, 10 BLR 1-56 (1987), held that, in determining whether the claimant had demonstrated the material change in conditions necessary to trigger development of the duplicate claim by the Office of Workers' Compensation Programs, the Board would rely on evidence of record that had not been submitted within the time frame contemplated by the decision in *Lukman*. It is anticipated that the holding in *Sahers* will have far-reaching effects in that the Board will be afforded a broader basis on

which to determine that a claimant has met the threshold standard for initiating the development of a duplicate claim, and thus established a proper basis for jurisdiction of the administrative law judge to conduct a hearing on the duplicate claim.

The chest x-ray is clearly a significant diagnostic tool in the treatment of pneumoconiosis, but the probative value of such x-ray interpretations in establishing entitlement under the Act has been questioned by Congress, see 30 U.S.C. §923(b), and has been the subject of much litigation under the Act, see generally *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427, 11 BLR 2-1 (1987), *reh'g denied*, 108 S.Ct. 787 (1988). In FY 1989, the Board addressed several issues relevant to the evaluation of x-ray evidence under the Act. In *McMath v. Director, OWCP*, 12 BLR 1-6 (1988), the Board held that application of the statutory prohibition against the obtaining of rereadings of certain x-rays read as positive, as provided for claims filed prior to enactment of the 1981 Amendments to the Act, 30 U.S.C. §923(b), may be triggered at any point by a positive reading of the x-ray by a reader having the particular qualifications specified by the Act. In *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), the Board held that a physician's interpretation of an x-ray did not qualify to establish pneumoconiosis by means of a reasoned medical opinion as required by 20 C.F.R. §718.202(a)(4). In *Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988), the Board held that a reader's assessment of an x-ray as "unreadable" did not require further explanation. In *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988), the Board held that an administrative law judge should not accord greater weight to the x-ray interpretation of a physician simply because the physician had also physically examined the miner.

Primarily because of the insidious nature of pneumoconiosis, the question of the date on which a claimant's disability began and concomitant entitlement to benefits commenced is frequently problematic. Claimants are rarely able to provide a physician's opinion concerning the exact date of onset of total disability under the Act. The Act and regulations

provide several limitations on the period of entitlement to benefits, see 30 U.S.C. §§923(d), 945(c), 20 C.F.R. §§725.203, 725.503, 725.503A, 727.302, most significantly mandating that, in cases in which the evidence of record does not establish the date of onset of disability, either the date on which the claim was filed or the date on which review under Section 435 of the 1977 Reform Act was elected, as is appropriate, will be determinative of the date of commencement of benefits in the claim. In FY 1989, the Board adopted the approach presented by the United States Court of Appeals for the Third Circuit in *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989), that the administrative law judge should avoid resorting to reliance on either the filing date or the election of review date unless he has first thoroughly considered all relevant evidence in determining that the date of onset of total disability cannot be determined, particularly when medical evidence of nondisability that antedates the date of filing or of election or medical evidence of disability that postdates the date of filing or of election has been credited in the case. *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); see *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989).

Longshore Act Cases

The Board also decided many novel and interesting issues arising under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, and its extensions which include the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (1973), the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.*, the Defense Base Act, 42 U.S.C. §1651 *et seq.*, the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.*, and the War Hazards Compensation Act, 42 U.S.C. §1701 *et seq.* A large portion of the Board's work involves cases of first impression arising under the 1984 Amendments to the Act (Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426). In *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989), the Board addressed the exclusion of office clerical workers from coverage under amended 33 U.S.C.

§902(3), affirming the administrative law judge's finding that claimant was covered. The Board held that the claimant's job as a clerk-checker handling documentation presented by truck drivers delivering cargo was related to the loading and unloading of cargo, in that the claimant's hours were tied to the movement of cargo, and he was subject to reassignment as a clerk-checker at any time.

In *Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989), the Board was faced with the issue of whether the application of the post-retirement provisions of the amended Act to a retired claimant who is diagnosed as having asbestosis, an occupational disease, is constitutional. The Board held that there was no violation of the Due Process Clause of the 5th Amendment of the United States Constitution because the stated congressional purpose of the voluntary retiree provisions, "to assure that eligible disease victims and their survivors receive compensation regardless of when in the worker's life the work-related disease manifests itself," is legitimate, and the method of achieving that purpose, i.e., retroactive application, is rational.

The Board also resolved several novel issues regarding claims for hearing loss under the 1984 Amendments. In *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989), and *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), the Board rejected the contention that Section 10(i), 33 U.S.C. §910(i)(Supp. V 1987), is inapplicable to hearing loss claims of voluntary retirees. The Board rejected the Director's argument urging the use of the date of last exposure to noise as the basis for determining average weekly wage. Thus, the Board held that the post-retirement provisions of Section 10(d) apply. Moreover, the Board held that in keeping with the liberal principles of the Act, benefits for voluntary retirees who suffer hearing losses should be calculated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), and should be based on the percentage of actual hearing loss under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. To restrict retirees with hearing losses to an award based on the percentage of whole person impairment occasioned by the hearing loss, see 33 U.S.C. §908(c)(23)(Supp. V 1987), would result in harsh and

incongruous results and would contravene the exclusivity of the schedule provisions of the Act.

In *Manders v. Alabama Dry Dock and Shipbuilding Corp.*, 23 BRBS 19 (1989), two consolidated cases involving claimants who had filed hearing loss claims several years after their retirement, the Board affirmed the administrative law judge's findings that the claimants are covered by the voluntary retiree provisions of the 1984 Amendments, and are therefore entitled to permanent partial disability benefits pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13). The Board rejected the employer's argument that the claimants did not "voluntarily" withdraw from the work force in that both of the claimants had previously filed claims for permanent total disability due to asbestosis which were still pending. The Board also affirmed the administrative law judge's conclusion that the 1984 Amendments to Sections 12 and 13, 33 U.S.C. §§912, 913 (Supp. V 1987), are applicable to the hearing loss claims in *Manders* because those claims were filed in 1986, after the Amendments' September 28, 1984 enactment date (Pub. L. No. 98-426, §28(a), 98 Stat. 1639, 1655). The 1984 Amendments specify that in the case of a hearing loss, the time for giving notice and filing a claim under Sections 12 and 13 does not begin to run until the employee receives an audiogram, with accompanying report, which indicates that he has suffered a loss of hearing. 33 U.S.C. §908(c)(13)(D)(Supp. V 1987). Since the claimants in *Manders* did not receive such audiograms until 1986, the same year their claims were filed, the Board concluded the claims were timely.

The 1984 Amendments to Section 8(f), 33 U.S.C. §908(f)(Supp. IV 1987), also changed the requirements for relief in hearing loss cases. Employer's liability in hearing loss cases is now limited to the lesser of 104 weeks or the extent of hearing loss attributable to the subsequent inquiry. In *Fisch v. General Dynamics Corp.*, 22 BRBS 251 (1989), the Board rejected the Director's argument that a pre-employment audiogram is required for Section 8(f) to apply in a hearing loss case. The Board found no legal justification for distinguishing between hearing loss cases and other disabilities, and held that

Section 8(f) applies when an audiogram administered during claimant's employment indicates a hearing loss under the AMA *Guides*, and the claimant thereafter sustains further exposure to noise which combines with the earlier loss to result in an increased hearing loss.

Since the 1984 Amendments to Sections 8(d) and 9 are not retroactively applied, the Board decided an interesting case involving those pre-1984 provisions. In *Abercumbia v. Chaparral Stevedores*, 22 BRBS 18 (1988), *aff'd on recon.*, 22 BRBS 18.4 (1989), the claimant, the widow of the longshoreman who died in 1981 from causes unrelated to his work injury, filed a claim for death benefits in 1982. The Board affirmed the administrative law judge's denial of death benefits under Section 9 because the claimant failed to satisfy her burden of proving that her deceased husband's work-related injury resulted in permanent total disability at the time of his death. The Board noted that the decedent had settled his claim based on permanent *partial* disability prior to his death and none of the medical reports of record established that he was unable to perform his usual longshore employment due to his work-related injury at the time of his death. The Board, however, reversed the administrative law judge's finding that, since the decedent had settled his claim before his death, and therefore, was not receiving compensation or entitled to compensation when he died, his survivors are precluded from receiving death benefits pursuant to Section 8(d)(3). The Board held that the settlement of the disputed disability claim had no effect on survivor's benefits, as the right to death benefits is separate and distinct and does not arise until death occurs. In addition, the Board noted that an employee need not be actually receiving permanent partial disability benefits at the time of death so long as he is ultimately found to have been entitled to such compensation.

Under Section 33(f) of the Act, where the claimant's net recovery against a third party equals or exceeds employer's workers' compensation liability, employer is entitled to offset past and future benefits against the amount of the third-party recovery. 33 U.S.C. §933(f)(Supp. V 1987). In *Force v. Kaiser*

Aluminum and Chemical Corp., 23 BRBS 1, (1989), the claimant, the widow of a deceased longshoreman, argued that the employer should be entitled to offset only part of the past and future benefits owed to the claimant against the amount of a third-party settlement. The Board affirmed the administrative law judge's conclusion that the employer is entitled to credit its entire liability for both disability and death benefits against the total net settlement amount on the ground that the settlement agreement had not allocated specific amounts for the various claims covered, and testimony introduced by the claimant regarding the "likely" value of various elements in the third-party settlement is not sufficient to establish apportionment for the purposes of the employer's offset under Section 33(f). The Board went on to hold that the employer may always offset its workers' compensation liability against the total net third-party recovery of a party "entitled to compensation" even if it includes such items as pain and suffering and punitive damages because such amounts are not specifically excluded from "net amount" under the statute. However, the Board also held that if the settlement had been apportioned *between* parties "entitled to compensation," for the disability and death claims the employer would only be entitled to offset its liability to each party against the portion of the settlement attributable to the surrender of that party's rights.

The Board also decided two unique cases involving interpretations of the statute of limitations provisions of the Act, 33 U.S.C. §§912, 913. In *Simpson v. Bath Iron Works Corp.*, 22 BRBS 25 (1989), the claimant filed a claim for benefits under the Longshore Act in 1977, almost 36 years after his 1941 injury. The claimant had initially obtained relief under the Maine Workmen's Compensation Act, which ended in 1948 when he reached the \$6,000 maximum ceiling on compensation in effect at that time. The Board held that the doctrine of laches did not apply since the Act contains a specific statutory period for filing a claim under Section 13 and the claimant's delay in filing his claim was not unreasonable. The Board also affirmed the administrative law judge's holding regarding the repeal of Section 14(m) of the Act, 33 U.S.C.

§914(m)(1970)(repealed 1972). Since the claim was not filed until five years after Section 14(m) was repealed and benefits were not awarded until 12 years after the statutory repeal, the Board concluded that the remedy available to the claimant should not be capped at the maximum in effect in 1941, and affirmed the administrative law judge's award of benefits.

In *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1982), the Board held that the claim for disability was barred by the claimant's failure to provide timely written notice pursuant to Section 12(a), 33 U.S.C. §912(a), and that the late filing could not be excused under Section 12(d), 33 U.S.C. §912(d). The claimant injured his back in an accident at work. He informed the employer of the accident but not of the back injury. He filed his claim more than two years after the injury, during which period no evidence revealed to the employer that the claimant had suffered a work-related injury. The Board held that under the circumstances, the employer's knowledge of an "accident" was insufficient to put it on notice of a work-related injury, and employer was prejudiced by the late filing because, due to the two year time lapse, it could not effectively investigate the nature of the claimant's injury.

Lastly, the Board was faced with the novel issue of whether a "jack-up" oil rig is a "vessel" under the Act so that the claimant's activities in building such a structure qualify as shipbuilding pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3). In *McCullough v. Marathon Letourneau Company*, 22 BRBS 359 (1989), the Board held that the claimant, who was injured while constructing a jack-up rig, met the status test of Section 2(3), 33 U.S.C. §902(3), since he could be classified as a shipbuilder who spent "some of his time" loading, unloading, repairing or building vessels. The Board held that the jack-up rig constituted a vessel because it was capable of floating and of being used as a means of transportation on water.

Information Activities

The Department of Labor stepped up its program to inform the American public about its many activities during the 1989 fiscal year. There were more public affairs initiatives, and they utilized all types of media more fully. This reflected an increasingly activist role by the Department and its leadership in enforcing worker protection laws and in administering other programs. Public affairs activities focused on, but were by no means confined to, the priorities set by the two Secretaries of Labor whose service spanned the fiscal year.

In addition to secretarial priorities, for example, public affairs initiatives reflected major regulatory actions, such as removal of the ban on industrial homework in five industries, and legislative priorities, such as a youth training wage as a condition to raising the minimum wage.

Another major effort was aimed at informing the public about a new Job Training Partnership Act (JTPA) program to help prepare "at risk" youths for the job market. Secretary Elizabeth Dole's Youth Opportunities Unlimited (YOU) program, with planning grants to 12 cities and two states, received extensive media coverage, as did a White House event honoring outstanding JTPA graduates. Use of radio actualities was especially successful in informing an important segment of the American public about the Secretary's proposal to amend JTPA, focusing programs on "at risk" youths. Actualities, in which the Secretary described the need for the amendments, were sent to 197 radio stations and used by more than one quarter of them. Among the 57 pickups were 12 regional networks, each reaching large numbers of additional stations.

During the year, the Labor Department started Labor News, an electronic bulletin board for news releases and other Labor Department information. Also initiated was the DOL Radio Actuality News Service. Radio stations can call an "800" number and receive a broadcast-actuality. Many of the actualities featured Secretary Dole. The service was launched on Labor Day weekend 1989, with the Secretary's Labor Day message. This was the first time a Secretary of Labor's Labor

Day message had been beamed specifically at radio. The radio news service received 57 calls, some of them from state networks serving multiple stations. The number of calls increased after the Department ran an advertisement in Broadcasting magazine to inform the industry about the service.

There was also much-increased use of video news in an effort to reach the widest possible audience with information about the many activities of the Department. One highlight was the first video Labor Day message by a Secretary of Labor, with Secretary Dole's 1989 Labor Day message being made available to television, as well as to radio and the print media.

A media highlight for outgoing Secretary Ann McLaughlin was the release of six task force and other reports covering important labor force issues.

Secretary Dole's visit to Poland with her husband, Senator Robert Dole, during the summer of 1989 was the first in a series of events reaching into the following fiscal year, leading to U.S. Department of Labor programs to help workers during the transition to democracy in Poland and Hungary.

Informational support was given to public hearings held in different parts of the nation by the Secretary's Commission on Workforce Quality and Labor Market Efficiency and to the presentation of the commission's report to Secretary Dole during the 1989 Labor Day weekend.

Another Department activity which became the subject of a major public information initiative was the Women's Bureau's Work and Family Clearinghouse, a major information resource itself, which proved increasingly valuable to individuals and groups seeking information about child care and other problems of working parents.

Informing the public about enforcement activities of the public was a high public affairs priority as the Department focused its enforcement programs, especially in safety and health, on flagrant violators. The Occupational Safety and Health Administration's program of developing standards to cover more areas also was the subject of important public information activities.

Of interest to students and others visiting the

Department's headquarters, the Frances Perkins Building, was the Labor Hall of Fame, developed by a non-profit group, Friends of the Department of Labor. Leaders from labor, industry, government and the academic world who shaped labor-management relations and contributed to the welfare of American workers were honored-- three when the Hall of Fame was opened and four more later in the year.

Throughout the year, the Department continued to issue weekly news packets for specialized media: black, Hispanic, labor, business and weekly publications and radio and television stations serving those groups. A monthly packet contains Labor Department information of interest to women workers.

As in previous years, these and other public affairs initiatives were designed to let workers and other members of the public know about Labor Department programs affecting them and to satisfy more fully the public's right to know what its government was doing.

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DOL Academy

A year of progress best describes the accomplishments of the DOL Academy during its first full year. In support of the Secretary's initiatives and the Department's role in the development and retention of a quality workforce, many new training programs were introduced and piloted during FY 1989. These programs provide Labor Department employees the opportunity to develop their skills, prepare for career advancement and meet future leadership needs through management development. During the year, the DOL Academy:

- Revised the Supervisory Reference Guide and distributed over 3,000 copies to supervisors and managers. The guide serves as a desk reference, providing information about Departmental administrative and personnel issues.
- Trained more than 600 supervisors in the four required courses: Skills Training; Labor-Management and Employee Relations; Equal Employment Opportunity; and the Human Side of Management.
- Provided in-house consultative assistance for 13 agencies and offices. This assistance included Transition Workshops; Drug Testing and Hazard Training; retreats and conferences; and Instructor Training. Each program is designed specifically to meet agency needs.
- Held 10 SES Forums which were attended by nearly 400 executives. Topics covered a wide variety of major concerns and skill needs of executives.
- Launched a 3-hour orientational briefing program

for political appointees. "DOL at a Glance" was attended by 85 new political appointees.

- Opened a new Individualized Instruction Lab, which provided 296 contact hours of instruction in reading, mathematics and English.
- Offered 68 Office Skills Institute courses.
- Designed four courses specifically for the Summer Youth Employment Program.
- Sponsored its first Professional Secretaries Week celebration. Seminars, workshops and films geared to the professional development of the secretarial and clerical support staff were attended by 100 employees.
- Pioneered a new and easy-to-use Training Policy Handbook which updates and communicates the needed guidance and information for all internal training.
- Developed and implemented a new training planning methodology. This process involves collecting and analyzing data available from position reference packages, Agency Human Resource Development Plans, budget documents and other resource documents. This process earned an award from the Washington-based Training Officers' Conference in the category of "needs assessment." An important outgrowth of the new training planning process was the design of "developmental paths" for three major occupational groupings: Investigator-Compliance Officers; Analysts; and Administrative Management Specialists.

- Submitted 21 courses to the American Council on Education for evaluation and awarding of college credits. All courses were approved.
- Expanded the services and available courseware offered by the Computer Assisted Learning Center (CALC). An additional 20 courses were added to the course catalog during FY 1989. Also, in conjunction with the Directorate of Information Resource Management's Office of Microcomputer Support, the Academy piloted its first mini-CALC in the New York regional office.
- Through the Resource Exchange the Academy provided a wide variety of educational programs on audio cassette, video, computer disk and film. During FY 1989 there were 436 training resources available and there were 1,096 borrowing instances.

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Appendix Tables

Appropriations and Other Obligational Authority

**Number of Employees on Labor Department
Rolls as of October 1, 1989**

**Selected Program Characteristics JTPA
Titles II-A and III PY 1988**

**Selected Services Provided by the U.S. Employment Service
Program Year 1988 (July 1, 1988 - June 1989)**

**Benefit Data Under State Unemployment Insurance Programs
U.S. and State Total for 1988**

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Appropriations and Other Obligational Authority

	FISCAL YEAR 1989 AMOUNTS
Federal Funds	
Employment and Training Administration, Program	
Administration	70,779,000
Training and Employment Services	3,783,169,000
Community Services Employment for Older Americans	343,824,000
Federal Unemployment Benefits and Allowances	224,648,000
Grants to States for Unemployment Insurance and	
Employment Services	22,559,000
Advances to the Unemployment Trust Fund and Other Funds	124,000,000
Total, Employment and Training Administration	4,568,979,000
Labor Management Services	72,182,000
Employment Standards Administration	211,915,000
Special Benefits	297,975,000
Panama Canal Commission	10,069,000
Occupational Safety and Health Administration	247,746,000
Mine Safety and Health Administration	162,621,000
Bureau of Labor Statistics	188,114,000
Departmental Management	119,869,000
Office of the Inspector General	39,517,000
Special Foreign Currency	0
Total, Federal Funds	5,918,987,000
Trust Funds:	
Unemployment Trust Fund (ETA)	25,506,799,000
Black Lung Disability Trust Fund (ESA)	689,222,000
Special Workers' Compensation (ESA)	85,163,000
Gifts and Bequests (ETA)	0
Total, Trust Funds	26,281,184,000
Proprietary Receipts	(46,354,000)
Interfund Transactions	(2,230,739,000)
Total, Department of Labor Budget	29,923,078,000
Other Funding	
Funds Appropriated to Other Agencies for Programs Administered	
by the Department of Labor:	
Department of Health and Human Services	
(Work Incentive Program)	19,602,000
Other Federal Agencies (Federal Employees Compensation Act)	1,062,793,000
Total, Other Funds	1,082,395,000
Grand Total, All Funds	31,005,473,000

Number of Employees on Labor Department Rolls as of October 1, 1989

	Full-Time	Permanent	(FTP)	Other		
	Total	D.C.	Field	Total	D.C.	Field
All Agencies	17,604	6,459	11,145	992	301	691
ETA	1,696	751	945	62	33	29
LMS	959	377	582	43	30	13
ESA	4,047	730	3,317	168	35	133
OSHA	2,270	417	1,853	83	22	61
MSHA	2,671	263	2,408	84	14	70
BLS	2,097	1,544	553	368	32	336
SOL	722	406	316	28	16	12
ILAB	83	82	1	8	8	0
OSEC	247	199	48	14	14	0
OASAM	926	551	375	53	28	25
OIG	524	173	351	10	1	9
VES	267	36	231	3	1	2
OTHER	575	410	165	24	23	1
PBGC	520	520	0	44	44	0

Selected Program Characteristics JTPA Titles II-A and III PY 1988

	Title II-A	Title III
Total Expenditures	\$1,814,314,030	\$252,019,246
Total Served	1,246,621	207,608
Total Terminees	745,095	135,442
Adult	55%	96%
Youth	45%	4%
Male	47%	60%
Female	53%	40%
White	50%	71%
Black	32%	17%
Hispanic	15%	9%
Alaskan/American Indian ..	2%	1%
Asian/Pacific Islander	2%	2%
School Dropout	27%	16%
Unemployed 15 or more of prior 26 weeks	N/A	43%
Entered Employment	60%	69%
Average Hourly Wage	\$5.07	\$7.54
Youth Positive Termination .. Rate	80%	N/A

Note: Percentages may not equal 100 due to rounding.

Selected Services Provided by the U.S. Employment Service Program Year 1988 (July 1, 1988 - June 30, 1989)

	Total Applicants	Referred to Jobs	Job Openings Received	Ind Pled/ Obt Empl
U.S. Total	18,085,692	7,446,322	7,239,823	3,793,611
Region I	673,995	287,782	272,975	131,502
Connecticut	223,728	80,076	71,718	39,290
Maine	116,735	48,138	33,515	16,474
Massachusetts	182,919	93,256	106,622	45,816
New Hampshire	51,489	25,273	18,211	13,031
Rhode Island	42,671	15,941	20,689	8,103
Vermont	56,453	25,098	22,220	8,788
Region II	1,324,107	330,707	567,561	230,687
New Jersey	330,021	69,130	94,061	44,200
New York	760,858	217,925	442,296	157,700
Puerto Rico	222,544	38,724	27,901	26,875
Virgin Islands	10,684	4,928	3,303	1,912
Region III	1,483,611	599,364	517,678	283,812
Delaware	22,135	6,800	9,590	3,887
District of Columbia	92,248	36,713	66,783	27,975
Maryland	175,130	71,733	73,839	40,370
Pennsylvania	631,373	257,680	199,254	119,874
Virginia	400,691	157,120	128,229	64,867
West Virginia	162,034	69,318	39,983	26,839
Region IV	3,823,732	1,858,576	1,605,864	841,080
Alabama	446,624	199,281	147,173	102,545
Florida	788,873	413,697	483,496	149,866
Georgia	455,159	214,358	143,265	99,365
Kentucky	373,498	152,193	106,485	83,528
Mississippi	343,975	161,834	116,653	81,476
North Carolina	667,610	355,239	305,813	177,368
South Carolina	330,594	171,372	163,268	74,231
Tennessee	417,399	190,602	139,711	72,701
Region V	3,316,869	1,010,161	862,043	581,536
Illinois	749,840	213,558	193,052	152,873
Indiana	475,168	185,926	116,215	70,231
Michigan	673,659	130,251	157,952	91,971
Minnesota	322,113	147,178	155,386	79,832
Ohio	741,288	189,779	143,050	108,238
Wisconsin	354,801	143,469	96,388	78,391

**Selected Services Provided by the
U.S. Employment Service
Program Year 1988
(July 1, 1988 - June 30, 1989) — Continued**

	Total Applicants	Referred to Jobs	Job Openings Received	Ind Pld/ Obt Empl
Region VI	2,949,466	1,148,112	941,407	661,230
Arkansas	298,633	138,751	106,707	73,928
Louisiana	415,882	159,779	123,278	80,460
New Mexico	174,754	45,272	46,226	31,998
Oklahoma	379,309	101,408	131,654	80,947
Texas	1,680,888	702,902	533,542	393,897
Region VII	1,168,650	535,712	457,713	259,376
Iowa	286,070	158,416	151,624	89,370
Kansas	219,809	92,541	80,279	45,665
Missouri	557,912	228,195	169,758	92,754
Nebraska	104,859	56,560	56,052	31,587
Region VIII	852,642	451,764	486,363	226,455
Colorado	273,456	118,601	117,960	56,285
Montana	114,377	52,023	64,297	28,061
North Dakota	97,252	61,377	51,565	28,351
South Dakota	93,861	60,535	68,801	30,362
Utah	202,920	118,417	144,781	61,241
Wyoming	70,776	40,811	38,959	22,155
Region IX	1,622,732	777,790	1,086,646	350,792
Arizona	302,335	125,358	90,352	40,006
California	1,139,129	553,219	894,851	278,593
Guam	7,559	5,108	3,651	2,266
Hawaii	68,606	37,259	32,234	11,346
Nevada	105,103	56,846	65,558	18,581
Region X	869,888	446,354	441,573	227,141
Alaska	86,509	47,499	62,387	26,129
Idaho	134,872	80,286	82,736	39,081
Oregon	286,361	158,423	126,918	71,287
Washington	362,146	160,146	169,532	90,644

Benefit Data Under State Unemployment Insurance Programs U.S. and State Totals for 1988

State	Claims data											Average weekly wage in covered employment
	Total number of beneficiaries	Weeks compensated for all unemployment	Claimants exhausting benefits		Average duration (in weeks)			Weekly insured unemployed		Average weekly benefit		
			Number	Percent of first payments	Potential	Actual	Actual for exhaustees	Average number	Percent of cov. employ.	Amount	Ratio to average weekly total wage	
United States	6,864,153	94,154,504	1,979,285	28.5	23.6	13.7	22.4	2,080,534	2.1	144.91	0.349	415.41
Alabama	146,918	1,423,642	28,791	19.9	23.0	9.7	21.3	31,338	2.2	101.09	0.283	357.01
Alaska	36,090	579,422	18,670	47.0	20.8	16.1	20.5	10,472	5.6	156.57	0.293	535.12
Arizona	67,064	1,023,125	21,394	29.4	24.4	15.3	22.4	22,930	1.7	113.91	0.293	388.53
Arkansas	83,544	1,044,177	20,796	24.3	23.9	12.5	23.1	24,984	3.1	125.61	0.389	323.02
California	968,239	14,203,939	304,607	31.5	24.0	14.7	23.0	319,238	2.7	122.29	0.265	461.83
Colorado	84,338	1,114,576	29,181	32.1	22.0	13.2	18.0	26,491	2.0	158.32	0.388	408.08
Connecticut	97,417	1,062,819	15,333	16.7	26.0	10.9	26.0	20,759	1.3	179.23	0.356	504.15
Delaware	20,168	257,636	2,393	14.4	25.6	12.8	26.0	4,255	1.4	169.66	0.403	420.51
Dist. of Columbia	19,796	369,595	9,195	45.7	24.8	18.7	24.6	7,522	1.8	187.98	0.346	542.60
Florida	162,897	2,091,773	57,556	36.5	21.0	12.8	19.5	50,958	1.1	139.50	0.375	371.81
Georgia	194,724	1,793,021	38,827	19.8	21.3	9.2	18.9	36,014	1.4	128.63	0.329	390.43
Hawaii	21,891	296,701	4,789	21.1	26.0	13.6	26.0	6,464	1.5	168.41	0.441	382.16
Idaho	37,626	456,730	11,408	28.9	19.6	12.1	16.8	11,276	3.6	136.48	0.409	333.85
Illinois	285,470	4,831,391	102,849	34.5	26.0	16.9	26.0	104,161	2.2	152.17	0.337	451.74
Indiana	107,930	1,193,273	26,189	22.6	16.1	11.1	15.2	29,339	1.3	104.15	0.267	390.65
Iowa	67,023	828,553	16,125	24.9	22.8	12.4	21.6	17,719	1.7	149.50	0.437	341.89
Kansas	70,404	934,867	21,510	31.6	22.6	13.3	21.5	19,487	2.0	162.43	0.448	362.35
Kentucky	103,523	1,340,366	21,271	20.4	26.0	12.9	26.0	27,850	2.3	115.13	0.326	353.24
Louisiana	117,638	1,843,513	54,814	42.1	24.0	15.7	21.8	42,404	3.0	125.86	0.342	367.94
Maine	35,033	378,501	7,358	20.6	21.2	10.8	20.8	8,924	1.9	139.64	0.403	346.90
Maryland	90,318	1,188,336	20,864	22.2	19.5	13.2	19.5	26,962	1.4	158.33	0.378	419.21
Massachusetts	185,470	2,703,832	52,662	30.0	27.2	14.6	26.4	57,918	2.0	197.93	0.427	463.07
Michigan	332,913	5,332,811	107,936	29.6	18.2	16.0	16.5	116,490	3.3	183.82	0.396	464.70
Minnesota	113,485	1,715,648	36,819	31.1	23.0	15.1	20.8	35,736	1.9	181.31	0.440	411.74
Mississippi	72,794	873,673	20,805	29.3	23.6	12.0	22.3	21,756	2.7	101.28	0.324	312.14
Missouri	145,766	1,946,226	43,081	28.1	22.5	13.4	21.2	44,690	2.2	119.59	0.310	386.38
Montana	22,737	318,984	7,996	32.9	18.3	14.0	18.3	7,468	3.0	130.50	0.411	317.51

Benefit Data Under State Unemployment Insurance Programs U.S. and State Totals for 1988 — Continued

Claims data												
State	Total number of beneficiaries	Weeks compensated for all unemployment	Claimants exhausting benefits		Average duration (in weeks)			Weekly insured unemployed		Average weekly benefit		Average weekly wage in covered employment
			Number	Percent of first payments	Potential	Actual	Actual for exhaustees	Average number	Percent of cov. employ.	Amount	Ratio to average weekly total wage	
Nebraska	30,671	374,158	8,267	24.4	22.4	12.2	17.4	8,439	1.3	117.30	0.359	326.92
Nevada	35,175	436,747	7,893	22.1	23.3	12.4	22.8	9,361	1.9	146.37	0.373	392.14
New Hampshire ..	19,051	102,544	338	1.8	26.0	5.4	26.0	2,719	0.5	125.06	0.315	397.51
New Jersey	238,880	3,474,150	77,912	33.3	24.0	14.5	22.5	70,510	2.1	179.84	0.364	493.72
New Mexico	30,694	492,463	10,803	34.8	25.8	16.0	25.3	11,602	2.4	122.49	0.357	343.24
New York	460,903	7,930,591	152,155	32.1	26.0	17.2	26.0	161,839	2.1	143.48	0.284	506.06
North Carolina ...	207,950	1,549,238	25,802	13.5	22.8	7.5	20.5	38,692	1.4	133.45	0.375	355.60
North Dakota	16,919	221,331	7,239	42.1	19.4	13.1	16.9	4,965	2.2	132.28	0.423	312.47
Ohio	291,651	3,881,092	71,111	24.6	19.2	13.3	18.9	89,427	2.0	151.33	0.368	411.24
Oklahoma	59,246	764,015	20,084	31.7	21.7	12.9	19.7	19,602	1.9	142.68	0.394	362.01
Oregon	102,608	1,396,582	23,903	22.4	25.5	13.6	24.8	31,437	3.0	146.75	0.393	373.06
Pennsylvania	378,573	5,500,735	83,259	21.5	25.9	14.5	25.8	118,519	2.5	164.47	0.401	410.03
Puerto Rico	74,617	1,213,983	37,178	58.6	20.0	16.3	20.0	32,062	4.2	77.38	0.342	226.21
Rhode Island	41,235	496,012	9,560	23.9	23.3	12.0	21.2	11,495	2.6	166.91	0.433	385.16
South Carolina ...	84,536	800,981	15,808	19.8	NA	9.5	NA	20,580	1.6	110.94	0.324	341.88
South Dakota	8,553	107,953	1,207	12.9	24.9	12.6	24.5	2,998	1.3	121.08	0.419	289.02
Tennessee	154,505	1,766,539	39,142	26.2	23.0	11.4	21.3	39,495	2.1	105.34	0.290	362.75
Texas	356,608	5,192,559	146,129	39.4	20.7	14.6	19.9	111,773	1.8	158.55	0.394	402.41
Utah	35,164	440,730	11,029	29.3	20.5	12.5	19.3	9,495	1.7	157.04	0.441	355.91
Vermont	15,054	184,425	2,103	13.8	26.0	12.3	25.7	4,117	1.8	132.61	0.373	355.41
Virgin Islands	1,586	21,199	319	29.0	23.8	13.4	22.3	494	1.3	121.44	0.384	316.45
Virginia	125,626	1,071,112	21,164	17.2	21.2	8.5	19.5	22,474	0.9	134.71	0.341	394.52
Washington	175,028	2,596,491	48,339	27.9	25.8	14.8	24.4	60,409	3.5	151.51	0.383	395.45
West Virginia	51,808	748,043	13,119	24.6	26.0	14.4	25.7	16,884	3.0	141.42	0.384	368.31
Wisconsin	164,752	2,070,359	38,383	22.9	24.5	12.6	22.0	43,601	2.2	148.59	0.393	378.14
Wyoming	11,544	173,342	3,820	30.6	21.8	15.0	20.4	3,941	2.3	158.79	0.438	362.16

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